No. 89——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GARY BRYANT,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL L. GOLDBERG
Counsel of Record
EDWARD J. MAGINNIS
TIMOTHY J. WHEELER
GREENE, BROILLET, PAUL,
SIMON & WHEELER
1000 Connecticut Avenue, N.W.
Suite 1205
Washington, D.C. 20036
(202) 293-0172
Counsel for Petitioner,
Gary Bryant

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QUESTION PRESENTED

The Court has already granted *certiorari* in this case once (*Ford Motor Co. v. Bryant*, No. 88-97), to review an *en banc* decision of the Ninth Circuit that a case could not be removed to federal court on diversity grounds where Doe defendants, properly pleaded pursuant to state law, remained in the case. Subsequently, the federal removal statute was amended and the Court vacated its order granting *certiorari* and denied *certiorari*. The Ninth Circuit then vacated its *en banc* decision, relying in part on the newly enacted legislation.

Now, Bryant seeks *certiorari*. The fundamental issue presented is the same as before; now the questions are:

1) Does an Act of Congress violate the *Erie* Doctrine by authorizing federal district courts, in determining whether complete diversity exists for purposes of removal, to disregard the citizenship of Doe defendants properly pleaded in a State court action, and by authorizing the district court to decline to permit the plaintiff to amend the complaint to designate the Doe defendants if such amendment would destroy subject matter jurisdiction when the plaintiff would have had an absolute right to so amend the complaint in State court had the action not been removed?

2) Did the application of the new statute after this Court denied *certiorari* deprive Petitioner of a property interest without due process of law.

LIST OF PARTIES

Petitioner, Gary Bryant, is an individual. Respondent, Ford Motor Company, is a corporation. When Ford initially petitioned for writ of *certiorari* in July, 1988, it listed its corporate subsidiaries and affiliates. That list is reproduced at Appendix F.

The complaint also lists as defendants, "Does 1-50," described as agents, servants, employees or joint venturers involved in the design, production, inspection and distribution of a certain vehicle. Petitioner has identified certain of these Does who should be parties if he were permitted to amend the complaint and serve these parties pursuant to State law. These are: City Ford Company, General Seating and Sash Company, Grumman-Olson Company and Grumman Corporation. Petitioner is unaware of any corporate subsidiaries or affiliates of these entities.

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Petitioner, Gary Bryant ("Bryant") respectfully prays that a writ of *certiorari* issue to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The September 25, 1989, Opinion of the Ninth Circuit (*"Bryant III"*), vacating its previous decision in the case and reinstating the district court's summary judgment, is reported at 886 F.2d 1526 (9th Cir. 1989). A copy of this appears at Appendix A. The *en banc* decision of the Ninth Circuit with respect to which this Court previously had granted *certiorari* (*"Bryant II"*), is reported at 844 F.2d 602 (9th Cir. 1987), and is reprinted at Appendix B. The orders of this Court, first granting a writ of *certiorari*, and then vacating and denying *cer-*

tiorari, are reported at —— U.S. —— (109 S.Ct. 54, 102 L.Ed.2d 32) and —— U.S. —— (109 S.Ct. 542, 102 L.Ed.2d 572) respectively, and are reprinted at Appendix C. The district court's summary judgment (no findings or conclusions were entered) was unreported, and appears as Appendix D.

JURISDICTION

Ford Motor Company ("Ford") initially removed the action from California state court pursuant to 28 U.S.C. Sec. 1441, on the basis that the action could have been brought in federal court pursuant to 28 U.S.C. Sec. 1332. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1), since this is an action in which the court of appeals has rendered a final judgment. This petition is filed within the 90 days allowed by 28 U.S.C. Sec. 2101.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the due process and equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution, 28 U.S.C. Secs. 1332, 1441 and 1447, and the California Code of Civil Procedure ("C.C.P."), Secs. 474 and 583.210, the pertinent portions of which are set forth at Appendix E.

STATEMENT UNDER RULE 28.4(b)

Since the petition draws into question the constitutionality of Section 1016 of the Act of November 19, 1988, 102 Stat. 4669-70, 28 U.S.C. Secs. 1441(a) and 1447(e), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. Sec. 2403 may be applicable.

To the best of Petitioner's knowledge, no court of the United States as defined by 28 U.S.C. Sec. 451 has, pursuant to 28 U.S.C. Sec. 2403(a) certified to the Attorney General the fact that the constitutionality of such an Act of Congress has been drawn into question.

STATEMENT OF THE CASE

On about March 1, 1983, Petitioner Bryant, a citizen of California, was involved in a single vehicle accident which rendered him paraplegic. Within the one-year statute of limitations prescribed by C.C.P. Sec. 340(3), Bryant filed a civil action for damages in Los Angeles Superior Court against Ford and fifty (50) real, albeit fictitiously-designated defendants.

The use of fictitiously-designated defendants is authorized by C.C.P. Sec. 474, "[w]hen the plaintiff is ignorant of the name of a defendant. . . ." As required by the California statute, the complaint stated the plaintiff's ignorance of the names of the Doe defendants. Bryant's complaint alleged that the Doe defendants were related to each other and to Ford as "agents, servants, employees and/or joint venturers," and that Ford and each of the Does were involved in the design, production, inspection and distribution of the vehicle which, the complaint alleged, was defective in design and construction. C.C.P. Sec. 583.210 gives a plaintiff an absolute right to amend the complaint to designate the Doe defendants at any time within three years of the commencement of the action upon ascertaining their true identity.[1] The effect is to toll the running of the statute of limitations for three years where Does are properly pleaded; and a complaint properly amended within that period will be timely. *Smeltzley v. Nicholson Mfg. Co.*, 18 Cal.3d 932, 136 Cal. Rptr. 269, 559 P.2d 624 (1977).

Ford removed the case to the U.S. District Court for the Central District of California, on the basis that it was not a domiciliary of California, and accordingly, that complete diversity existed between it, the only "named" defendant, and Bryant. Discovery proceeded in the district

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[1] C.C.P. Sec. 581a was applicable at the commencement of the action. That section was subsequently repealed and replaced by Sec. 583.210, which is substantially similar. *See Bryant II, supra*, 844 F.2d at 605, n.4 (App. at 21a).

court, revealing that Ford had made only the vehicle chassis. Pursuant to its standard record-destruction policies, Ford had destroyed all records relating to the vehicle, making more difficult Bryant's task of identifying the manufacturers of the component parts of the vehicle, and the retailer. On Ford's motion, judgment in Ford's favor was entered. The district court made no disposition with respect to the Doe defendants. Appendix D.

Bryant then moved in the district court to substitute the seller of the vehicle and two manufacturers of component parts for certain of the Doe defendants, and to remand the action to State court, since at least two of these parties were domiciliaries of California. The district court declined to rule on the motion having concluded that it was without jurisdiction. In an effort to enable the district court to act upon that portion of the case which remained (the case against the Does), Bryant filed a motion for relief from judgment or alternatively for reconsideration. The Ninth Circuit, to which Bryant had appealed, granted a limited remand to enable the district court to consider the motion, and when the district court denied the motion, Bryant renewed his appeal.

The three-judge panel applied a long-standing Ninth Circuit rule that Doe defendants are real, albeit unidentified parties, who, unless they are shams, defeat diversity. The panel found that the instant case fit within none of the exceptions to this rule and, ruled accordingly, that the district court was unable to determine that complete diversity existed at the time of removal, and was thus without jurisdiction to enter summary judgment. The panel returned the case to district court with instructions to remand the action to state court. *Bryant v. Ford Motor Company*, 794 F.2d 450 (9th Cir. 1986) (*"Bryant I"*). On Ford's petition, the matter was reheard, *en banc*, and again, on Ford's petition, by the full court, which modified the *en banc* decision. *Bryant II*.

In *Bryant II*, the court acknowledged the substantive effect of the California Doe pleading law, and eliminated

the exceptions to the general rule which theretofore had required the district court to make the "near impossible determination of when the allegations against the Doe defendants are 'specific' enough to defeat diversity." *Bryant II, supra*, 844 F.2d at 605 (App. at 23a). The court reasserted that since Does are real, albeit unidentified parties, their citizenship could not be established for purposes of determining the existence of complete diversity, and that accordingly, the 30-day period for removal would commence only after either (1) all Doe defendants had been named, (2) the plaintiff had unequivocally abandoned the action against the Doe defendants (such as by dropping them from the complaint or commencing trial without service upon the Doe defendants), or (3) the Does had been dismissed by the state court. *Id.* at 605-06 (App. at 23a-24a). The court observed that such an approach "accommodates both a plaintiff's right under California law to a three-year ex-extension of the statute of limitations and a defendant's statutory right to removal under 28 U.S.C. Sec. 1441." *Id.* at 606 (App. at 24a). This Court granted *certiorari* in connection with this opinion in *Bryant II*. *Ford Motor Co. v. Bryant*, —— U.S. ——, 109 S.Ct. 54, 102 L.Ed.2d 32 (1988).

After *certiorari* was granted, the Judicial Improvements and Access to Justice Act (P.L. 100-702) became law. Section 1016 of that statute amends the Judicial Code with respect to removal jurisdiction by:

—adding to 28 U.S.C. 1441(a), a new sentence mandating that "the citizenship of defendants sued under fictitious names . . . be disregarded" in determining if diversity exists; and

—adding to 28 U.S.C. 1447, a new subsection "(e)" which permits a district court after removal to decline to permit a plaintiff to join a defendant whose joinder would destroy diversity jurisdiction.[2]

[2] Sec. 1016 also made certain changes to removal procedure. Amendment to 28 U.S.C. 1446 provides that removal is to be on an

While several of the separate sections of P.L. 100-702 have specific effective dates, Sec. 1016 does not, and there is no general effective-date provision for P.L. 100-702.

In its opening brief in this Court, Ford suggested that the provisions of P.L. 100-702, at that time awaiting the President's signature, were dispositive of the case. After enactment, Ford filed a *Motion to Vacate and Summarily Reverse the Judgment of the Court of Appeals* in this Court, relying on the new legislation. Five days later, this Court, without ruling on Ford's motion, vacated its order granting *certiorari*, and entered a new order, denying *certiorari*. *Ford Motor Co. v. Bryant, supra*, —— U.S. ——, 109 S.Ct. 542, 102 L.Ed.2d 572.

Before the circuit court had received notice of denial of *certiorari*, Ford petitioned for a stay of the mandate, and, relying on the authority of the just-enacted amendments to the federal removal statute, moved to vacate *Bryant II* and to reinstate the judgment of the district court. Bryant opposed, arguing, *inter alia*, the inappropriateness of application of the new law after the denial of *certiorari*, and that the changes made by Sec. 1016 violate the due process and equal protection clauses. Nine months later, however, in *Bryant III*, the court below did vacate its previous decision, and did reinstate the district court's judgment.

In *Bryant III*, the court acknowledged that there is no provision in the Federal Rules for a stay of mandate *after* a denial of *certiorari*. Rather, analogizing to its inherent power to recall its mandate to prevent injustice or protect the integrity of its processes, the court reasoned that it should also be able to stay its mandate prior

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unverified (and unbonded) "Notice of Removal" rather than by petition as previously required; and removal must be accomplished within one year of commencement of the action. That section is further amended to require that any motion to remand a case on the basis of any defect in procedure must be made within 30 days of the filing of the notice of removal.

to receipt of this Court's order denying *certiorari* where "exceptional circumstances" exist, such as the "abrupt change of law," reasoning that it would be unfair to deny Ford the benefit of the new law. *Bryant III*, *supra*, 886 F.2d at 1528-29, 1530, n.5 (App. at 4a-5a, 6a-7a).

Reasoning that this Court could once again grant *certiorari* and review its new decision, the Ninth Circuit found that appeal was therefore not yet exhausted, and the process of direct review had not yet ended with this Court's denial of *certiorari*. *Id.* at 1530-31 (App. at 9a). Thus, the court concluded that the case remained "pending" and that the new law applied to Bryant's case even after this Court had denied *certiorari*. *Id.* at 1533 (App. at 13a-14a). The court then turned to the "merits" of Bryant's appeal, which it had not previously addressed because it had found the district court without jurisdiction.

The court of appeals did not rule on Bryant's attack on the constitutional soundness of the new statute's provisions permitting the district court to decline to permit the plaintiff to amend the complaint to name the Does after removal if such would destroy diversity jurisdiction (28 U.S.C. Sec. 1447(e)), since Bryant had only moved for leave to amend the complaint to identify and serve three of the Does after the district court had entered judgment in Ford's favor. *Bryant III*, *supra*, 886 F.2d at 1531 (App. at 11a).

But, the Ninth Circuit used the amended version of 28 U.S.C. Sec. 1441(a), ("[f]or purposes of removal . . . the citizenship of defendants sued under fictitious names shall be disregarded") as a post-hoc validation of the district court's decision to ignore the presence of the Doe defendants both when it entered judgment for Ford, and when it ruled on the post-judgment motions. *Bryant III*, *supra*, 886 F.2d at 1533 (App. at 14a.)

The court thus validated the district court's refusal to deal with the case against the Does, and vacated its pre-

vious decision, and affirmed the district court's summary judgment.

REASONS FOR GRANTING THE PETITION

Congress' authority to regulate the jurisdiction of the federal district courts permits the Congress to ordain that those courts may disregard the citizenship of Doe defendants and assume jurisdiction of a case on less than complete diversity. But, that authority should not enable the Congress to permit the courts to alter the character and outcome of such an action once it is removed—which is surely the effect of new Sec. 1447(e), denying the plaintiff the right to amend the complaint after removal. Such legislation, which enables the simple removal of a case from State to federal court to change the nature and the outcome of the litigation, makes impossible equal protection of the law and is contrary to the fundamental concepts underlying our federal scheme as those concepts have been defined in this Court's *Erie*-doctrine cases.

Doe pleading provisions exist in one form or another in the laws of more than thirty states. Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 Stan. L. Rev. 297, 300-01, n.14 (1983). Thus, the question presented—whether a federal statute can authorize a federal court, upon removal of an action in which Does are pleaded in State court, to treat the Does and the case against the Does in a manner different than the State court would—is one of broad importance in the determination of federal court jurisdiction and procedure. If, as Petitioner asserts, this enactment exceeds the Congress' authority to regulate the diversity jurisdiction of the lower federal courts, determination of that question now will avoid imminent, serious consequences in the administration of the federal courts.

I. THE AMENDMENTS TO SECTIONS 1441 AND 1447 OF TITLE 28, UNITED STATES CODE, VIOLATE THE *ERIE* DOCTRINE.

The new legislation ignores the fact that parties sued as Does, because their identity was unknown to the plaintiff at the time of the commencement of the action, are nonetheless real parties, and that under the law of California, a cause of action exists against them at the time the complaint is first filed. *Barrows v. American Motors Corp.*, 144 Cal. App. 3d 1, 9, 192 Cal. Rptr. 380 (1983). By requiring that the district court simply ignore the citizenship of these real, albeit unidentified, parties when it determines that complete diversity exists for purposes of removal, and then by permitting a district court to decline to allow the plaintiff to name them after removal, the new legislation permits different substantive law to be applied in federal court than would be applied in State court.

A. California's Doe Pleading Statute Constitutes Substantive State Law.

Under California law, when a complaint in which a defendant is sued as a Doe is amended to name the Doe, and the named party is served, the defendant so brought into the action "is considered a party to the action from its commencement so that the statute of limitations stops running as of the date of the earlier pleading." *Austin v. Massachusetts Bonding & Insurance Co.*, 56 Cal. 2d 596, 599, 15 Cal. Rptr. 817, 364 P.2d 681 (1961).

The interplay of C.C.P. Sec. 474 (which permits a plaintiff to sue a defendant under a fictitious name) and C.C.P. Sec. 583.210 (which requires a complaint to be served no later than three years after it is filed), gives a plaintiff who properly invokes the Doe pleading mechanism the substantive right to amend his complaint within three years after filing to name a Doe defendant, and bring him or her into the action. *Barrows v. American*

Motors, supra, 144 Cal. App. 3d at 9. Indeed, under California law, the case against the Doe defendants exists from commencement of the action, even before the Does are named and served; and survives resolution of the case against the named defendants. *Barrows, supra*, 144 Cal. App.3d 1; *Streicher v. Tommy's Electric Co.*, 164 Cal. App.3d 876, 211 Cal.Rptr. 22 (1985) (plaintiff may amend complaint to designate Does after settlement with all named defendants.) "There can be little doubt that [sections] 474 and 583.210, taken together are 'integral' to California's statute of limitations scheme and embody state substantive policy." *Brennan v. Lermer Corp.*, 626 F. Supp. 926, 929 (N.D. Cal. 1986). Read together, they are the "functional equivalent" of a four-year limitations period. *Lindley v. General Electric Co.*, 780 F.2d 797, 800 (9th Cir. 1986), *cert. den.*, 476 U.S. 1186 (1986).

Under the *Erie* doctrine, State laws constituting "an integral part" of a State's limitations law, such as those tolling the statutes of limitations, are substantive law which must be respected by federal courts when sitting in diversity. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752-53 (1980); *Regan v. Merchant's Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949). In this respect, the decision of the court below ignoring the substantive effect of California law which would make the Doe defendants parties to the action from its commencement, even before they are named and served, is directly in conflict with the decision of the First Circuit in *Marshall v. Mulrenin*, 508 F.2d 39, 44 (1st Cir. 1974).

B. The "*Erie*-Doctrine" Precludes Congress From Authorizing the Lower Federal Courts To Resolve Removed Cases in a Way Which Denies Litigants Substantive State Law Rights.

The Court has made clear that State statutes of limitations are "substantive" State law which must be applied by a federal court sitting in diversity. *Guarantee Trust Co. v. York*, 326 U.S. 99 (1945). Just as the federal

courts have no power to declare substantive rules of law applicable in diversity actions, neither does the Congress. "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or part of the law of torts." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965); *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 202 (1956).

This case, the first as far as Petitioner knows, to present the question of the propriety of the 1988 Amendments to 28 U.S.C. Secs. 1441(a) and 1447(e), presents the Court with the opportunity to clarify both that statutes of limitations (including provisions for tolling of those limitations statutes) are substantive law, and that just as the federal courts sitting in diversity cannot ignore the implications of the substantive effect of the State limitations statutes, neither can the Congress authorize the federal courts to do so.

By the changes in the law of federal removal achieved by Sec. 1016 of P.L. 100-702, the Congress attempts to do just that—to authorize the lower federal courts to ignore the substantive effect of State statutes of limitations. The new law—authorizing the district courts to ignore Doe defendants and then telling them to ignore an integral element of California's statute of limitations law where Does are pleaded—violates the *Erie* doctrine. Does cannot be ignored, but more significantly, the effect of pleading them pursuant to State law cannot be ignored. Congress' "see no evil" solution to the problem of accommodating Doe defendants pleaded in State actions after those actions are removed to federal court only compounds the task of striking a proper balance between the federal right to removal and the right under substantive California law to use Doe pleading to extend the statute of limitations. In doing so, Congress has disturbed the fragile balance which, this Court has made clear, characterizes our fundamental system of federalism.

In *Swift v. Tyson*, 16 Pet. 1 (U.S. 1842) (10 L.Ed. 865), the Court had held that federal courts exercising diversity jurisdiction need not apply the law of the State on matters of "general jurisprudence" and that they were free to apply their own interpretation of the State law, toward the end of developing a more uniform law for application in the federal courts. In *Erie v. Tompkins, supra*, 304 U.S. 64, the Court examined the effect of nearly one-hundred years of law under *Swift*, and concluded that the development of a substantive law to be applied in federal courts had miserably failed its objective, revealing both "political and social" defects.

> [T]he mischievous results had become apparent. Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be detemined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law.

Erie v. Tompkins, supra, 304 U.S. at 74-75.

As the Court subsequently explained, "[t]he *Erie* rule is rooted in part in a realization that it would be unfair for the *character or result* of a litigation materially to differ because the suit had been brought in a federal court." *Hanna v. Plumer, supra*, 380 U.S. at 467 (emphasis added). This is an acknowledgment that diversity jurisdiction was intended to protect the distant defendant from prejudicial local justice, but that it was intended to be used as a shield, not as a sword. "And so Congress afforded out-of-State litigants another tribunal, not another body of law." *Guaranty Trust Co. v. York, supra*, 326 U.S. at 111-12.

The amendments to the federal removal law accomplished by Sec. 1016 of P.L. 100-702, fly in the face of this injunction. First, by permitting the district court to disregard the citizenship of Doe defendants, the new law permits removal even when the presence of Doe defendants makes it impossible to find complete diversity. But this, of course, is Congress' right. However, once such a case is removed, the new Sec. 1447(e) enables it to be retained in the district court by the simple expedient of refusing to permit a plaintiff to amend the complaint to name a non-diverse party—*even though the plaintiff would have been able as a matter of right to have named that party in the State court.* This is not Congress' right—it makes impossible equal protection of the law, and the Constitution requires that Congress' establishment of the lower federal courts be consistent with equal protection and the fundamental concept underlying our federal scheme.

Thus, the new law violates this Court's caution against "creat[ing] discrimination against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949). "It was that element of discrimination that *Erie* . . . was designed to eliminate." *Id.* With one stroke, Congress has restored the doctrine of *Swift v. Tyson*, and has created a mechanism by which different substantive law will apply depending upon whether the action proceeds in State or federal court.

The new law converts diversity jurisdiction from a shield into a sword—the very result which this Court's *Erie* doctrine was intended to prevent. By eliminating a plaintiff's absolute right to substitute named defendants for the Does within the statutory period permitted by the substantive law of the State, the new Sec. 1447(e) permits a removing defendant to change the outcome and the very character of the case by the mere act of removal. Defendants who could be pursued in State court may no

longer be pursued in federal court after removal. With the elimination of joint and several liability in California (California Civil Code Secs. 1431.1, 1431.2), this creation of "empty chairs" affects not only the result of the litigation in terms of the plaintiff's recovery, but changes how the action will be prosecuted and defended as well. Theories of liability which could be raised in State court may not be able to be raised in federal court after removal.

Thus, while the jurisdiction of the lower federal courts (including the parameters of diversity jurisdiction) is a creature of the Congress, *certiorari* should be granted so that the Court may reaffirm that the *Erie* doctrine limits Congress' authority to trump State substantive law through legislation, just as surely as it limits the ability of the federal courts to do so. "[T]he accident of diversity of citizenship [should not] disturb equal administration of justice in coordinate state and federal courts sitting side by side. (Citing *Erie*). Any other ruling would do violence to the principle of uniformity within a state, upon which [*Erie*] is based." *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 496 (1941).

II. THE RETROSPECTIVE APPLICATION OF SECTION 1016 OF PUBLIC LAW 100-702 TO THIS CASE AFTER THIS COURT HAD DENIED *CERTIORARI*, DEPRIVED THE PETITIONER OF HIS PROPERTY RIGHTS WITHOUT DUE PROCESS OF LAW.

As with all "good things," litigation, too, must at some time come to an end. Logic and good order would suggest that that time comes when this Court has denied *certiorari*. Thus, there is no statutory authority, and none under the Federal Rules of Appellate Procedure, for staying a mandate after denial of *certiorari* so that a party can urge the court of appeals to reconsider the case yet again under a new legal rubric. The denial of *certiorari* ends the litigation, and the case is no longer

sub judice. Seese v. Volkswagenwerk, A.G., 679 F.2d 336, 337 (3d Cir. 1982).

The Court has long recognized that a litigant's interest in a lawsuit is a property interest which is entitled to protection under the Fifth and Fourteenth Amendments. *Martinez v. California*, 444 U.S. 277, 282-83 (1979).

The effect of application of the new removal statute on Petitioner's property interest in this case is devastating. Relying on a long-standing practice of State pleading whose legitimacy and substantive nature is unquestionable, Petitioner sued as Does those real, albeit at the time unidentified, defendants, thus using California's Doe-pleading statute to establish a case against the Doe defendants even before they were named and served, and to extend the statute of limitations to provide himself the opportunity to ascertain the identity of these real parties, and serve them, even after Ford's dismissal. *Barrows v. American Motors, supra*, 144 Cal.App.3d 1; *Streicher v. Tommy's Electric, supra*, 164 Cal.App.3d 876.

The Ninth Circuit rejected Petitioner's argument that the summary judgment in Ford's favor did not terminate the action against the Doe defendants as "unavailing under the new amendment to section 1441(a), which provides that doe defendants 'shall be disregarded.'" *Bryant III, supra*, 886 F.2d at 1533 (App. at 13a-14a). Thus, the Ninth Circuit retrospectively applied the new Sec. 1441(a) to legitimize removal of this action from State to federal court where such removal was clearly improper when it was accomplished, prior to the enactment of the new law. Indeed, the Ninth Circuit went beyond the language of Sec. 1441(a), reading the permission to "disregard[]" the citizenship of Doe defendants "[f]or purposes of removal" as authority to disregard the very existence of Doe defendants for all purposes once the case had been removed. Thus, the question of what happened to the case against the Doe defendants after entry of judgment in favor of Ford (and only in favor

of Ford) is now answered; on the basis of the new provision of Sec. 1441(a), the court below has determined that that case no longer exists.

The Ninth Circuit never asserted that its decision in *Bryant II* was wrong.[3] Clearly, what happened in *Bryant III* was that the court below used the new law permitting the citizenship of Doe defendants to be disregarded for purposes of determining the existence of diversity as a basis for its conclusion that the district court did have jurisdiction to enter the judgment for Ford, even though at the time that judgment was entered, under the law as it then stood, the district court was without subject-matter jurisdiction.

This post-hoc application of the provisions of the new law to the case after the Petitioner had relied upon the old law in forming his pleadings and filing his complaint, essentially robs Petitioner of his causes of action against the Doe defendants through the simple act of removing the action to federal court. Removal became a jurisdictional shell game in which the "pea" of a viable cause of action against real defendants was made to disappear. The Ninth Circuit had correctly ruled in *Bryant II* that

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[3] The decision in *Bryant II* accurately reflected the law of removal as it existed at that time. The pre-amendment version of Sec. 1441(a) provided that a defendant could remove from a State court any action which could originally have been filed in the district court, which, pursuant to 28 U.S.C. 1332(a)(1), included cases between citizens of different states involving the minimum amount in controversy. Thus, Petitioner's case was improperly removed because it could not have been filed originally in the district court. The presence of the Doe defendants would have made it impossible for Bryant to demonstrate complete diversity. *Molnar v. National Broadcasting Company*, 231 F.2d 684, 686-87 (9th Cir. 1956). Rule 3.7.2.1 of the U.S. District Court for the Central District of California at that time prohibited (and still prohibits) the clerk from "accept[ing] for filing any complaint or petition that includes any party designated as a Doe or a wholly fictitious name unless accompanied by a dismissal of the fictitiously named parties. . . ."

this could not be done. In *Bryant III*, it concluded that the new law permits this to be done.

Since the retrospective application of a statute may deprive a litigant, as it has here, of a property interest in pending litigation, the Court has made it clear that "[t]he retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). Retrospective deprivation of a vested property right should only be permitted when retrospective application of a statute accomplishes some "rational legislative purpose." *Pension Benefit Guaranty Corp. v. R.A. Gray Co.*, 467 U.S. 717, 730 (1984).

In the instant case, Congress expressed no legislative objective, rational or otherwise, for destroying or affecting existing causes of action. The Ninth Circuit's speculation that Congress must have been aware of its decision in *Bryant II* when it enacted the new law (even though Congress made no mention of it) (*Bryant III*, *supra*, 886 F.2d at 1530 (App. at 7a)), and must have thus intended the new law to apply retroactively to the Bryant case (even though Congress stated no effective date at all for the provision) (*id.*), is not, and cannot be a statement of a "rational legislative purpose."

There is no indication that Congress even considered the effect that the new legislation would have on Petitioner's lawsuit, or that it intended that the new legislation affect Petitioner's case. Clearly, no rational legislative objective in undoing the decision in *Bryant II* was expressed by the Congress. Without such an expression, the retrospective application of the new law to deprive Petitioner of his property interest in the legislation is without due process of law, and is contrary to the decisions of this Court.

Effective administration of the federal courts suggests that *certiorari* should issue so that the Court may examine such retrospective application of legislation to cases no longer on direct review.

CONCLUSION

For the reasons stated herein, the petition for writ of *certiorari* should be granted.

Respectfully submitted,

MICHAEL L. GOLDBERG
Counsel of Record
EDWARD J. MAGINNIS
TIMOTHY J. WHEELER
GREENE, BROILLET, PAUL,
SIMON & WHEELER
1000 Connecticut Avenue, N.W.
Suite 1205
Washington, D.C. 20036
(202) 293-0172
Counsel for Petitioner,
Gary Bryant

December 22, 1989

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 84-6389, 85-5698

GARY BRYANT,
Plaintiff-Appellant,
v.

FORD MOTOR CO.,
Defendant-Appellee.

Following the United States Supreme
Court's Order Vacating Certiorari
Dec. 12, 1988

Submitted Jan. 27, 1989

Decided Sept. 25, 1989

Before WALLACE, HUG, and HALL, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

This court has had an enduring relationship with this case, although we never have considered the merits of plaintiff-appellant Gary Bryant's contention that the district court below erred by entering summary judgment in favor of defendant-appellee Ford Motor Corporation. Instead, we have concluded—on two occasions—that the district court lacked subject matter jurisdiction to enter judgment due to the presence of doe defendants. *See Bryant v. Ford Motor Co.*, 794 F.2d 450 (9th Cir.1986);

Bryant v. Ford Motor Co., 844 F.2d 602 (9th Cir.1987) (en banc) (*Bryant II*). In our *Bryant II* en banc decision, we overruled numerous cases that had created exceptions to the general rule in this circuit that doe defendants defeat diversity jurisdiction.

As *Bryant II* overturned the judgment entered in Ford's favor, Ford filed a petition for certiorari, which the Supreme Court granted on October 3, 1988. — U.S. ——, 109 S.Ct. 54, 102 L.Ed.2d 32 (1988). On November 19, 1988, the President signed into law the Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100-702, 102 Stat. 4642 (1988) (the "Act"). Section 1016(a) of Title X of the Act contains an amendment to the removal statute that provides that doe defendants do not defeat diversity jurisdiction. 102 Stat. at 4669. On December 5, 1988, the Supreme Court vacated its order granting the petition for certiorari and denied the petition. — U.S. ——, 109 S.Ct. 542, 102 L.Ed.2d 572 (1988).[1]

Fed.R.App.P. 41(b) provides that the circuit courts shall issue the mandate "immediately" following the denial of a petition for writ of certiorari.[2] On December 7, 1988, Ford filed an emergency motion to stay the mandate, which the *en banc* court granted. Ford's motion preceded this court's receipt on December 12, 1988, of the Supreme Court's order denying certiorari. On December 20, 1988, Ford filed a motion to extend the stay of mandate and to vacate the *en banc* opinion. On January 25,

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[1] On November 17, 1988, Ford filed a brief in the Supreme Court arguing that the Act, yet to be signed into law, would govern this case. Following the President's approval, Ford filed a motion in the Supreme Court for the summary reversal of *Bryant II*. The Court, however, denied certiorari without ruling on Ford's motion.

[2] Ford successfully moved this court for a stay of the mandate subsequent to our judgment in *Bryant II*, which continued throughout its appeal to the Supreme Court pursuant to Rule 41(b).

1989, the *en banc* court referred this motion to this three-judge panel. We first address Ford's motion to stay the mandate in this opinion. As a result of Ford's motion the mandate has not yet issued.

I

Section 1016(a) of the Act amends 28 U.S.C. § 1441(a) by adding the following sentence: "For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded." Congress obviously reached the conclusion that doe defendants should not defeat diversity jurisdiction. Ford argues that this amendment controls this case. If it does, then our *en banc* opinion in *Bryant II* ordering the district court to remand this case to the state court must be vacated, and we will have to reach the merits of Bryant's appeal.

Congress did not specify an "effective date" for section 1016(a). Consequently, it was unclear whether it applied to cases pending when the Act became law. Where a case is pending on direct review "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). In *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1425 (9th Cir.1989), *amended* (June 26, 1989), this court held that section 1016(a) fell within the general rule: "section 1016(a) took effect upon passage and applies to cases pending on that date." We find no manifest injustice in applying *Kruso*'s holding to this case.

II

Despite the *Kruso* decision, Bryant raises three challenges to application of section 1016(a): first, this court can stay the mandate only under exceptional circumstances, which are not present; second, the *Bradley* pre-

sumption is inapplicable because this case is not pending on direct review; and third, application of section 1016(a) is unconstitutional.

A

Bryant is correct that "[t]here is no provision in the United States Code or the Federal Rules of Appellate procedure that permits an appellate court to prevent or delay issuance of its mandate" following the denial of certiorari. In fact, Rule 41(b) expressly directs that "[u]pon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately." Nonetheless, Bryant does not contend that this court is powerless to stay issuance of the mandate. Bryant concedes that we retain jurisdiction where a party moves for a stay of the mandate prior to this court's receipt of the Supreme Court's order denying certiorari. But he argues that a stay is warranted only where exceptional circumstances would justify an order recalling the mandate.

Rule 41(a) provides that the mandate shall issue 21 days following a circuit court's judgment. But the Rule authorizes a circuit court to stay the issuance of the mandate beyond this 21-day period. No exceptional circumstances need be shown to justify a stay. This matter is entrusted to the circuit court's sound discretion. Rule 41(b) provides that a circuit court may stay the mandate pending the filing of an application for a writ of certiorari, and that any such stay shall continue until "final disposition" by the Supreme Court.[3]

Ordinarily, then, a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay. The situation changes markedly, however, once the Su-

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[3] Ninth Circuit Rule 41-1 provides that a stay pending petition to the Supreme Court will not be granted "as a matter of course, but will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay."

preme Court has denied the petition for a writ of certiorari. Rule 41(b) orders that the mandate "shall issue immediately" upon the denial of certiorari. Consequently, a circuit court's issuance of the mandate following the denial of certiorari ordinarily is a ministerial act. For this reason, Bryant argues that a stay following the denial of certiorari is the exceptional case, analogous to a circuit court's decision to recall a mandate.

While no statute or rule so provides, we have recognized a circuit court's inherent power to recall its mandate to prevent injustice or to protect the integrity of its process. *See Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir.1988); *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 254 (9th Cir.1973). The power of a Court of Appeals to recall its mandate should only be exercised in exceptional circumstances, such as to protect the integrity of its own processes, to prevent injustice, or for other good cause. *Zipfel*, 861 F.2d at 567. Recalling the mandate is solely within the circuit court's discretion. *Id.* Although this court has not addressed our inherent power to stay the mandate upon proper motion following the Supreme Court's denial of certiorari, the Fourth Circuit has done so in *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823, 98 S.Ct. 67, 54 L.Ed.2d 80 (1977).

In *Alphin*, the appellate panel previously had affirmed a finding that the plaintiffs had proved the defendant's attempted monopolization, but it held that plaintiffs were not entitled to attorney's fees because they could not prove damages. *Id.* at 1034. The plaintiffs petitioned for certiorari and while the petition was pending, Congress amended the antitrust laws to provide for attorney's fees whenever a plaintiff substantially prevails. After the Supreme Court denied certiorari, but prior to the circuit's receipt of a notice of denial of certiorari, the plaintiff moved the circuit court to stay issuance of the mandate and to award him attorney's fees based upon the new law.

The *Alphin* court concluded that it would not work a manifest injustice to apply the new attorney's fees statute to the case pending before it. The court found the *Bradley* presumption applicable because "[o]ur control over a judgment of our court continues until our mandate has issued." *Id.* at 1035. Thus, the court treated a change in the law occurring in this procedural posture the same as a change in the law occuring before an appellate court files its judgment. In other words, the court interposed no special requirement of exceptional circumstances in order to stay the mandate following the denial of certiorari.

We agree with the *Alphin* court that a circuit court has the inherent power to stay its mandate following the Supreme Court's denial of certiorari. "An appellate court's decision is not final until its mandate issues." *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir.1988). However, Bryant appropriately objects to a reading of *Alphin* that makes it obligatory for an appellate court to stay its mandate in this situation. The *Alphin* court did not expressly interpose a threshold requirement of exceptional circumstances before the mandate would be stayed.[4] Yet, we find that Rule 41(b)'s express direction that the mandate shall be issued immediately upon the denial of certiorari makes such a threshold showing necessary. "For most purposes, the entry of judgment, rather than the issuance of mandate, marks the effective end to a controversy on appeal." *Finberg v. Sullivan*, 658 F.2d 93, 96 n. 5 (3d Cir.1981) (en banc).

In the nearly unprecedented procedural posture of this case, we find that exceptional circumstances justify a stay of the mandate. In our recent *Zipfel* decision, we

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[4] The *Alphin* court's discussion of the factors favoring retroactive application of the new law indicates that it identified exceptional circumstances favoring a stay, *see Alphin*, 552 F.2d at 1034-35, but it did not acknowledge this prerequisite expressly.

concluded that recalling the mandate was appropriate where the Supreme Court decided a case shortly after our decision that partly was inconsistent with our approach. We chose to exercise our power to recall the mandate "'[b]ecause of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent injustice. . . .'" *Zipfel*, 861 F.2d at 567-68 (quoting *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977)).

As an abrupt change in the law shortly after the panel's opinion justifies a recall of the mandate, Congress's action while this case was pending on certiorari justifies a stay of the mandate, and we choose to exercise our discretion to do just that in this case. Congress's enactment of the Act after the Supreme Court had granted certiorari conceivably deprived Ford of its day in court before the Supreme Court. By denying certiorari, the Supreme Court certainly put its precious resources to better use than it would have addressing an issue that Congress already had settled, at least for all future lawsuits. Had Congress acted specifically to overrule our *Bryant II* decision, it would have been patently unfair to deprive Ford the benefit of that action. Yet, the Act's legislative history fails to rule out *Bryant II*'s relevance.[5] Justice demands that Ford's arguments for the affirmance of the district court's summary judgment receive a judicial forum.[6]

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[5] The proposal to disregard doe defendants originated with the United States Judicial Conference, which transmitted its recommendations to Congress. *See Reports of the Proceedings of the Judicial Conference of the United States* 71 (1987). Yet, given the contemporaneous enactment of the the Act and the granting of certiorari in *Bryant II*, it is unlikely that Congress was ignorant of our decision.

[6] Bryant argues that Ford "must do much more than demonstrate a change in the statutory law" to justify a stay of the mandate. Bryant relies upon a recall of the mandate case, *United States*

B

While a stay of the mandate is justified in this case, we must apply *Kruso*'s holding that section 1016(a) applies to pending cases. In *Kruso*, the Act became law subsequent to the district court's judgment but before we filed our opinion. Here, the Act became law after both the district court's judgment and our own. While *Kruso* might appear dispositive, we must first decide whether, given its unusual procedural posture, this is a pending case for purposes of *Kruso*.

The *Bradley* Court stated that "a court is to apply the law in effect at the time it renders its decision." 416 U.S. at 711, 94 S.Ct. at 2016. Bryant is correct that the cases Ford cites involve changes in the law occurring "subsequent to the judgment and *before* the decision of the appellate court." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801) (emphasis added). Bryant submits that the process of direct review ended, at the latest, when the Supreme Court denied the petition for a writ of certiorari.

The *Bradley* Court drew a "distinction between the application of a change in the law that takes place while a case is on direct review, on the one hand, and its effect on a final judgment under collateral attack, on the other hand." 416 U.S. at 711, 94 S.Ct. at 2016. As evidence that this case is no longer on direct review, Bryant cites

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v. Tulare Lake Canal Co., 677 F.2d 713, 715 (9th Cir. 1982), where we said that "[a] change in controlling authority or a conviction that the court erred are ordinarily not alone sufficient grounds for recall of a mandate after final judgment." But the Supreme Court *vacated* our decision in *Tulare Lake*, a fact Bryant overlooks. *See* 459 U.S. 1095, 103 S.Ct. 712, 74 L.Ed.2d 943 (1983). Even assuming that *Tulare Lake* correctly identified the general rule, it is not unprecedented for a court to recall a mandate to consider a subsequent change in the law. *See Zipfel, supra; United States v. Kismetoglu*, 476 F.2d 269 (9th Cir.), *cert. dismissed*, 410 U.S. 976, 93 S.Ct. 1454, 35 L.Ed.2d 709 (1973).

the Supreme Court's definition of "final judgment": "'the availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed." *Id.* at 711 n. 14, 94 S.Ct. at 2016 n. 14. Bryant reasons that, as the time has now passed to petition for certiorari, this case is no longer on direct appeal. We disagree.

This issue is not unrelated to our decision to stay the mandate; where the mandate has not issued the availability of appeal has not yet been exhausted. *See Alphin*, 552 F.2d at 1035 ("our control over a judgment of our court continues until our mandate has issued"); *Mary Ann Pensiero*, 847 F.2d at 97 ("An appellate court's decision is not final until its mandate issues"). *Bradley* describes a dichotomy between review in collateral proceedings and direct review. Bryant would have us conclude that where an appellate court stays the mandate following the denial of certiorari for further consideration, its formerly direct review suddenly mutates into collateral review. We find this proposition both remarkable and unacceptable.

Nothing prevents the Supreme Court from granting certiorari on the issue which we decide. As enumerated in 28 U.S.C. § 1254(1), the Supreme Court may review a case from a court of appeals "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." The statute notably imposes no limitations as to the status of the case, effectively giving the Supreme Court plenary authority to grant certiorari over cases coming from the federal courts of appeals. *See Forsyth v. City of Hammond*, 166 U.S. 506, 513, 17 S.Ct. 665, 668, 41 L.Ed. 1095 (1897) (describing the Supreme Court's authority to grant certiorari under an earlier form of the present statute as "comprehensive and unlimited"); *see also Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1, 93 S.Ct. 647, 650 n. 1, 34 L.Ed.2d 577 (1973) (concluding that a prior dismission of certiorari does not foreclose the Court from reaching a new issue

where the court of appeals ruled that its prior decision was not a final judgment).

Therefore, we hold that our holding in *Kruso* governs this case.

C

The Act amended 28 U.S.C. § 1447 to add subsection (e), which provides that "[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." Bryant argues that a district court's power to maintain jurisdiction while denying a plaintiff's motion to add a nondiverse defendant violates principles of federalism and the equal protection clause. He also claims that the district court's power to disregard doe defendants deprives him of a property interest protected by the due process clause of the fifth amendment.[7] Bryant reasons that if this amendment creating section 1447(e) is unconstitutional, then so is the entire Act, including the jurisdictional amendment to section 1441(a).

Bryant addresses a critical threshold issue in a footnote: his standing to challenge section 1447(e). Obviously, the district court did not enter judgment against Bryant on the authority of section 1447(e). It was not in existence. Recognizing this formidable obstacle, Bryant argues that this court can only affirm the district court's entry of summary judgment upon a "determination that the district Court's refusal to permit BRYANT to amend his complaint and join the additional defendants was appropriate under the new (and retroactively applied) 28 U.S.C. 1447(e)."

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[7] Bryant correctly notes that in California a plaintiff has a statutory right to amend his complaint to substitute a named defendant for a doe defendant. *See, e.g., Barrows v. American Motors Corp.*, 144 Cal.App.3d 1, 7, 192 Cal.Rptr. 380, 382 (1983).

Bryant's premise is faulty. As we explain in our analysis of the merits of his appeal, *infra*, the district court did not deny a motion to amend the complaint to add new defendants—Bryant never filed such a motion and only sought to add new defendants after the entry of judgment. As Bryant is incorrect that we can affirm the district court's rulings only by reference to the new section 1447 (e), he lacks standing to challenge this amendment. *See Waste Management of North America, Inc. v. Weinberger*, 862 F.2d 1393, 1398 (9th Cir.1988) (generalized grievance insufficient to confer standing).

We, therefore, vacate our *en banc* opinion in *Bryant II* ordering the district court to remand this case to the state court, and we now address the merits of Bryant's appeal.

III

Bryant sued Ford as a result of injuries he sustained while driving in a United Parcel Service van on March 1, 1983. Bryant filed suit on January 27, 1984, in Los Angeles Superior Court, alleging that the van had a defective restraint system and driver's seat. Bryant named Ford as the only known defendant, but he also alleged that Does 1 through 50 were responsible for his injuries. Ford filed a petition to remove the case to federal court on March 29, 1984, alleging diversity between Bryant, a citizen of California, and Ford, a Delaware corporation with its principal place of business in Michigan.

A

Bryant took discovery by interrogatories, seeking to learn the identities of other parties allegedly responsible for the design, manufacture, and sale of the van. Due to its corporate policy of destroying certain records after ten years, Ford had no documents concerning the van. On May 10, 1984, the parties met and inspected the van. Present was a Ford engineer, who concluded that Ford

had manufactured only the chasis and that Ford had not participated in the assembly of the van or in the manufacture of the restraint system of the driver's seat.

Ford filed a motion for summary judgment on July 9, 1984. Bryant's counsel informed the court on August 6, 1984, that he believed that the van was purchased from City Ford Company, that General Seating and Sash Company had manufactured the seating system, that Grumman Corporation had manufactured the truck body, and that an unknown manufacturer in Pacoima, California, had made the passive restraint system. Bryant's counsel's statement, however, was not an affidavit based upon personal knowledge as required by Fed.R.Civ.P. 56(f). In addition, he did not move the court to amend the complaint to add these parties, nor did he petition the court to stay Ford's motion for summary judgment until Bryant could complete discovery on the identities of other possible defendants. Finding no genuine issue as to any material fact, the district court entered summary judgment in Ford's favor based upon a lack of evidence that Ford was connected to the driver's seat or the passive restraint system.

What followed was a bizarre series of procedural developments precipitated by Bryant's attempt to resurrect his case. Bryant filed a motion for leave to add additional defendants, or in the alternative, for a remand to state court. The district court did not act on these motions, having concluded that it was without jurisdiction. Bryant filed a notice of appeal on September 26, 1984. Nonetheless, in an attempt to provide the district court with jurisdiction to consider his post-judgment motion, Bryant then filed a motion pursuant to Fed.R.Civ.P. 60(b)(6) for relief from the judgment, or in the alternative, for reconsideration of the order granting summary judgment. The district court denied these requests.

On January 22, 1985, this court concluded that the district court lacked jurisdiction to enter its order denying

Rule 60(b) relief, because Bryant's notice of appeal had divested the district court of jurisdiction. We remanded the case so that the district court could rule on Bryant's motions. On February 8, 1985, the district court again denied Bryant's motion for reconsideration and relief from the judgment. Bryant timely appealed.

B

Bryant does not argue that a genuine issue as to any material fact remained concerning Ford's liability. Indeed, Bryant states that "summary judgment was entered in favor of FORD after early discovery indicated that FORD was most likely not responsible for the allegedly defective seat and passive-restraint systems." But Bryant argues that his action against the doe defendants still was pending when the district court entered summary judgment against Ford. In other words, Bryant argues that the district court only entered judgment against Ford and that "the balance of the case, against the remaining [doe] defendants, remain[ed] alive and active in the district court." As support, Bryant cites Fed.R.Civ. P. 54(b), which provides that, when multiple parties are involved, unless the district court directs the entry of a final judgment for fewer than all of the parties, a judgment against one party does "not terminate the action as to any of the claims or parties. . . ." [8]

This court already has rejected the proposition that the presence of doe defendants in Bryant's complaint meant that the summary judgment in favor of Ford was not a final judgment. *See Bryant II*, 844 F.2d at 604 n. 2. In any event, Bryant's argument is unavailing under the new amendment to section 1441(a), which provides that

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[8] Given Bryant's concession that summary judgment appropriately was entered against Ford, his vigorous pursuit of the doe defendants perhaps is explained by a desire to preserve the tolling of the statute of limitations effected by the naming of doe defendants.

doe defendants "shall be disregarded." Accordingly, we reject Bryant's argument that the district court's judgment failed to terminate the action against the doe defendants.[9]

C

Generally, we review a grant of summary judgment de novo. *See Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986). However, Bryant challenges the district court's alleged failure to permit adequate discovery before ruling on the motion. We review the district court's failure to continue the motion and permit additional discovery for an abuse of discretion. *See Beneficial Standard Life Ins. Co. v. Madariaga*, 851 F.2d 271, 277 (9th Cir. 1988).

Rule 56(f) authorizes a district court to delay ruling on a summary judgment motion where the opposing party files an affidavit explaining the need for a continuance.[10] Bryant, however, did not file a Rule 56(f) affidavit. Bryant's failure to request that the district court delay a ruling on Ford's summary judgment motion until he had more time to identify other potential defendants is

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[9] As an aside, we note that Bryant's view of the continuing presence of doe defendants in federal court is incorrect under our prior case law. Before *Bryant II*, doe defendants precluded the removal of a case to federal court unless they could be characterized as shams. *See Bryant II*, 844 F.2d at 605. Consequently, whenever a case with doe defendants was permitted to proceed in federal court, it was only because they were appropriately "ignored." *Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1330 (9th Cir. 1981). Thus, Bryant's suggestion that a federal district court previously had jurisdiction to entertain claims against doe defendants is incorrect.

[10] Rule 56(f) provides as follows: "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

explained by his misapprehension that his case would continue pending against the doe defendants notwithstanding Ford's dismissal. This was Bryant's mistake, not the district court's. Nonetheless, Bryant contends that the district court should have *sua sponte* continued its ruling on Ford's motion.

Bryant relies upon the principle that "[g]enerally where a party has had no previous opportunity to develop evidence and the evidence is crucial to material issues in the case, the discovery should be allowed before the trial court rules on a motion for summary judgment." *Program Engineering, Inc. v. Triangle Publications, Inc*, 634 F.2d 1188, 1193 (9th Cir.1980). It is far from clear, however, that the district court rushed to judgment. Ford removed this case on March 29, 1984, and the district court entered summary judgment on August 20, 1984, about five months later. *See Hall v. Hawaii*, 791 F.2d 759, 760-61 (9th Cir. 1986) (affirming summary judgment entered four months after filing of suit). In addition, there was no likelihood that Ford, the only defendant before the court, was going to be able to identify any other parties, given that it no longer maintained any records about the van.

Finally, Bryant's failure to comply with Rule 56(f) is relevant. While *Program Engineering* concluded that a Rule 56(f) affidavit is not always necessary in order "to raise in the lower court the issue whether [the opponent] was entitled to additional discovery," 634 F.2d at 1193, the absence of a formal request for a continuance is relevant to the question whether the district court abused its discretion by ruling on the motion when it did, *see Beneficial Standard*, 851 F.2d at 277 (opponent's "informal, oral requests to the court for more time to conduct discovery fell short of compliance with Rule 56"); *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986) ("Failure to comply with the requirements of Rule 56(f) is a proper ground for denying dis-

covery and proceeding to summary judgment."); *Foster v. Arcata Associates, Inc.* 772 F.2d 1453, 1467 (9th Cir. 1985) ("We reject appellant's claim because she failed to follow the proper procedures under the Federal Rules of Civil Procedure for obtaining a continuance or other appropriate discovery order when opposing a motion for summary judgment."), *cert. denied,* 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576 (1986). For these reasons, we conclude that the district court did not abuse its discretion by deciding Ford's summary judgment motion when it did.[11]

IV

For the reasons outlined in this opinion, we VACATE the judgment of this court entered in *Bryant II,* and AFFIRM the district court's entry of summary judgment.

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[11] Bryant does not argue on appeal that the district court abused its discretion by denying his Rule 60(b) motion for relief from the judgment. We review the district court's ruling on a Rule 60(b) motion for an abuse of discretion. *Thompson v. Housing Authority of the City of Los Angeles,* 782 F.2d 829, 832 (9th Cir.), *cert. denied,* 479 U.S. 829, 107 S.Ct. 112, 93 L.Ed.2d 60 (1986). The record provides no indication that the district court abused its discretion.

APPENDIX B

UNITED STATES COURT OF APPEALS
Ninth Circuit

Nos. 84-6389, 85-5698

GARY BRYANT,
Plaintiff-Appellant,

v.

FORD MOTOR CO.,
Defendant-Appellee.

Argued En Banc and Submitted July 16, 1987

Decided Nov. 6, 1987

As Amended on Denial of Rehearing and
Rehearing En Banc April 15, 1988

Appeal from the United States District Court
for the Central District of California

Before BROWNING, Chief Judge, and GOODWIN, SNEAD, ANDERSON, CANBY, NORRIS, REINHARDT, HALL, KOZINSKI, THOMPSON, and O'SCANNLAIN, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Plaintiff-appellant Gary Bryant appeals from the decision of the district court granting summary judgment

in favor of defendant-appellee Ford Motor Company. We conclude that the district court lacked jurisdiction over this action because of the presence of Doe defendants at the time of removal from state court.

I.

Bryant initiated this action for negligence, breach of warranty, and strict liability in California state court against Ford and Does 1 through 50. Ford removed the action to the United States District Court for the Central District of California based upon diversity of citizenship.[1] Bryant did not object to removal. The district court took no action with respect to the Doe defendants.

Bryant seeks recovery for injuries he sustained in an accident while driving a Ford van for United Parcel Service on March 1, 1983. Bryant contends that the passive restraint system in the van was defective because it did not include a shoulder harness. Bryant's complaint alleges that Does 1 through 50 are related to each other and to Ford as "agents, servants, employees and/or joint venturers." Bryant claims that Ford and each of the Doe defendants were involved in the design, production, inspection, and distribution of the van which Bryant was driving at the time of the accident.

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[1] 28 U.S.C. § 1441 (1982) provides, in relevant part, as follows:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

A joint inspection of the van by the parties on May 10, 1984 revealed that Ford had manufactured only the chassis of the van. The body and other components, including the passive restraint system, were produced by other companies as part of a joint venture. The companies responsible for producing the component parts could not be identified at the time of removal or the time of inspection because the van was produced in 1968 and Ford destroyed records containing this information after ten years.

Ford moved for summary judgment. In opposing Ford's motion, Bryant noted that he planned to name Doe defendants as soon as he discovered their identities. The district court nonetheless granted summary judgment in favor of Ford, concluding that there were no material facts supporting Ford's liability because of the inspection evidence that Ford was not involved in the production of the passive restraint system.[2] Bryant then moved the court to add City Ford Company, the seller of the van, General Seating and Sash Company, the producer of the seats, and Grumman-Olson Company, the producer of the body, to the action and to remand the case to state court. City Ford and Grumman-Olson are California corporations. The district court denied Bryant's motion, finding that the presence of non-diverse parties was not new evidence justifying relief from judgment under Fed.R.Civ.P. 60(b) (1982).

Bryant appealed the grant of summary judgment. We granted a limited remand at Bryant's request for the

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[2] The district court did not enter judgment against the Doe defendants. Despite the fact that the Doe defendants were not formally dismissed, this case is properly before this court. *See Patchick v. Kensington Publishing Corp.*, 743 F.2d 675, 677 (9th Cir. 1984) ("If an action is dismissed as to all of the defendants who have been served and only unserved defendants remain, the district court's order may be considered final under [28 U.S.C. § 1291] for the purpose of perfecting an appeal.").

district court to again reconsider its previous rulings. The district court again refused to join the additional parties, and this appeal of the district court's rulings followed.

Applying Ninth Circuit law, a panel of this court then held that because the Doe defendants in the complaint were real but unidentified people or entities, the district court could not determine whether they would defeat diversity jurisdiction once identified. *Bryant v. Ford Motor Co.*, 794 F.2d 450, 453 (9th Cir.1986). The panel remanded the case to the district court with instructions to remand to the appropriate state court. *Id.* After a petition for rehearing was filed, the panel requested en banc consideration of this case in order to clarify Doe defendant law in the Ninth Circuit. For the reasons set forth below, we now remand this case to the district court with instructions to remand to the appropriate state court.

II.

California law allows a plaintiff to sue any potential defendant whose name is unknown under a fictitious name (commonly as a Doe defendant). Cal.Civ.Proc.Code § 474 (West 1979).[3] A plaintiff who names a Doe de-

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[3] Cal.Civ.Proc.Code § 474 (West 1979) provides, in relevant part, as follows:

> When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)."

fendant in his complaint and alleges that the defendant's true name is unknown has three years from the commencement of the action in which to discover the identity of the Doe defendant, to amend the complaint accordingly, and to effect service of the complaint. Cal.Civ.Proc.Code § 581a (West 1976).[4]

Up to this point, the general rule in the Ninth Circuit has been that the naming of Doe defendants defeats diversity jurisdiction and, therefore, that district courts should remand cases containing allegations against Doe defendants to state court. *See, e.g., Othman v. Globe Indem. Co.*, 759 F.2d 1458, 1462-63 (9th Cir.1985). This general rule has become riddled with exceptions, however. Under our cases, an action need not be remanded to state court in at least five situations: (1) when named defendants prove that the Doe defendants as described in the complaint are wholly fictitious, *see, e.g., Grigg v. Southern Pacific Co.*, 246 F.2d 613, 619 (9th Cir.1957); (2) when the complaint contains no charging allegations against the Doe defendants, *see, e.g., Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1330 (9th Cir.

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[4] When Bryant commenced this action in state court, the relevant provision was Cal.Civ.Proc. Code § 581a(a), 1982 Cal.Stat. 2574-75 (repealed 1984), which provided as follows:

> (a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of the action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has made a general appearance in the action.

This section has since been repealed, but a substantially similar provision has been enacted as Cal.Civ.Proc.Code § 583.210 (West Supp. 1987).

1981); (3) when plaintiffs unequivocally abandon their claims against the Doe defendants, *see, e.g., Southern Pac. Co. v. Haight*, 126 F.2d 900, 905 (9th Cir.), *cert. denied*, 317 U.S. 676, 63 S.Ct. 154, 87 L.Ed. 542 (1942); (4) when the complaint does not identify the Doe defendants with sufficient specificity, *see, e.g., Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 843 (9th Cir.1982); and (5) when the Doe defendants are not indispensable parties, *see, e.g., Othman*, 759 F.2d at 1463.

The numerous exceptions to the general principle that the naming of Doe fedendants defeats diversity jurisdiction have led to considerable confusion as we ourselves have recognized. In *Othman*, 759 F.2d at 1462 & n. 7, we noted that "the circumstances under which an action including 'Doe' defendants may be removed to federal court [are] not entirely clear in this circuit." *See also Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 279 n. 2 (9th Cir.1984) (describing "the vague contours of when Doe pleading is specific enough to defeat diversity"). District court judges and commentators have also noted the doctrinal disarray in our decisions. *See, e.g., Goldberg v. CPC Int'l, Inc.*, 495 F. Supp. 233, 236 (N.D.Cal.1980) (circumstances under which the presence of Doe defendants destroys diversity "unfortunately remain shrouded in mystery and confusion"); Note, *Doe Defendants and Other State Relations Back Doctrines in Federal Diversity Cases*, 35 Stan. L.Rev. 297, 308 n. 38 (1982) (noting inconsistency in Ninth Circuit case law).

At the request of the three-judge panel, this court agreed to hear this case en banc in order to develop a coherent standard in the Doe defendant area. We now hold that the presence of Doe defendants under California Doe defendant law destroys diversity and, thus precludes removal. The nature of the allegations against such Doe defendants is irrelevant for federal removal purposes. *See CTS Printex, Inc. v. American Motorists*

Ins. Co., 639 F.Supp. 1272, 1277 (N.D.Cal.1986). We overrule all of our cases creating exceptions to this general rule. *See, e.g., Grigg*, 246 F.2d at 619; *Chism*, 637 F.2d at 1330; *Hartwell*, 678 F.2d at 843; *Othman*, 759 F.2d at 1463. Under our new rule district courts will no longer have to make the near-impossible determination of when the allegations against Doe defendants are "specific" enough to defeat diversity. Instead, the 30-day time limit for removal contained in 28 U.S.C. § 1446(b) will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff,[5] or dismissed by the state court.[6] If a defendant attempts to

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[5] Unequivocal abandonment occurs in only two situatons: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants. *See Haight*, 126 F.2d at 904-05.

[6] The voluntary-involuntary rule, which provides that only a voluntary act of the plaintiff can render a case removable to federal court, applies only to state court judgments on the merits against named defendants. *See, e.g., Self v. General Motors*, 588 F.2d 655 (9th Cir. 1978). This rule is inapplicable to the dismissal by state courts of Doe defendants.

We recognize that our rule may lead to removal at a late stage in the proceedings. A defendant may be able to expedite removal, however, by seeking the plaintiff's consent to drop the Doe defendants. We disagree with the dissent's assumption that plaintiffs will not facilitate removal by stipulating to dismiss the Doe defendants. Dissent at 611 n.9. Plaintiffs have an incentive to make such a stipulation in order to expedite the litigation. This is especially true in cases where Doe defendants are "phantoms." In such cases, plaintiffs will be reluctant to delay the inevitable removal of their cases, thereby delaying their day in court.

The dissent makes a number of other assumptions which we are unwilling to make. First, the dissent states that "every" civil case now filed in California contains allegations against Doe defendants and that the "vast majority" of these defendants are "procedural fictions" or "phantoms" invoked " 'superstitiously and without reason.' " *See, e.g.*, Dissent at 608 (citation omitted), 609, 611, 611-12, 612, 613-14, 618. We disagree. The dissent cites no evidence for its assumption that every civil case now filed in California contains allegations against Doe defendants. Moreover, when Doe

remove a case prior to this time, the district court must remand the case to state court.[7] This new rule accommodates both a plaintiff's right under California law to a three-year extension of the statute of limitations and a defendant's statutory right to removal under 28 U.S.C. § 1441.[8]

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defendants are named, they are frequently named because a plaintiff is unable to discover who the additional defendants are prior to filing suit. For example, in this case, it was only after discovery that Bryant was able to determine the identities of City Ford, General Seating and Sash, and Grumman-Olson.

Second, the dissent assumes that our decision will allow states to foreclose removals altogether. *Id.* at 611 n.10. On the contrary, there is no reason to believe that states will enact Doe defendant statutes in a bad faith attempt to defeat the federal removal statute.

Finally, the dissent assumes that our solution will delay removal in "virtually *every*" California diversity case for three years or more. *Id.* at 613 (emphasis in original). The waiting time for obtaining a trial date, however, is considerably less than three years in most California counties. It is preposterous to assume that "virtually every" removal will be delayed for three years or more.

[7] This new rule will apply retroactively. Federal courts should remand pending cases containing allegations against unnamed Doe defendants to state court unless both parties agree to dismiss the Doe defendants.

[8] The dissent states that its solution "would eliminate *all* the problems associated with the addition of Doe defendants." *Id.* at 619 (emphasis in original). As the dissent admits, however, its solution may lead to parallel litigation in state and federal court. *Id.* at 619. We simply are not convinced that the potential for duplication of effort under our solution is any greater than under the dissent's solution.

Furthermore, the dissent claims that federal courts can accommodate a plaintiff's right to add Doe defendants by remanding the portion of the case alleging claims against the Doe defendants to state court. Absent from the dissent's analysis is any mention of what action a court should take when a plaintiff attempts to name a *diverse* Doe defendant after the 120 day time limit contained in Fed.R.Civ.P. 4(j) has expired. If such a case were remanded to state court, the diverse defendant could simply re-remove to federal court, resulting in an unwarranted ping-pong game between state

III.

Because the complaint in this case contained Doe defendants as parties, removal was premature. We REMAND to the district court with instructions to remand to the appropriate state court. Each party shall bear its own costs on this appeal.[9]

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and federal court. On the other hand, if the federal court were to deny the plaintiff the opportunity to name the diverse Doe defendant, it would be denying the plaintiff an important state law right.

[9] Ford also argues that in our earlier opinion we used the wrong test to determine whether the district court should have remanded the case. Ford correctly notes that Bryant did not challenge the removal before final judgment was entered. When removal is not challenged until after judgment has been entered, the standard is not whether removal was proper, but whether the district court would have had original jurisdiction if the case had been filed in that court in the posture it was in as of the time of trial or judgment. *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 705, 92 S.Ct. 1344, 1348, 31 L.Ed.2d 612 (1972); *Gould v. Mutual Life Insurance Co.*, 790 F.2d 769, 773-74 (9th Cir. 1986). Even under this standard, however, remand is required. The presence of Doe defendants destroys diversity of citizenship. Here, the Doe defendants were never dismissed. Accordingly, original jurisdiction would not have lain with the district court. *See Garter-Bare Co. v. Munsingwear, Inc.*, 650 F.2d 975, 981 (9th Cir. 1980); 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3642 (1985).

NORRIS, Circuit Judge, concurring:

I concur in the judgment because I agree that the district court lacked jurisdiction at the time of removal. Bryant's complaint alleged that Ford and each of the 50 Doe defendants were involved in the design, production and distribution of the Ford van which Bryant claimed had a defective passive restraint system because it did not include a shoulder harness. At the time of removal, Ford made no effort to show that no California resident could have committed acts within the charging allegations of the complaint and thus failed to carry its burden of establishing complete diversity. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 540, 59 S.Ct. 347, 350, 83 L.Ed. 334 (1939) (named defendant bound to show unnamed defendant a nonresident to justify removal). It made no effort, for example, to show that no one who had any involvement in the design, production or distribution of the van was a resident of California. Consequently, I believe we should decide this case on the narrow ground that the district court lacked jurisdiction because of Ford's failure to show complete diversity at the time of removal.

Although I concur in the judgment, I cannot join the court's opinion because I agree with Judge Kozinski that the court writes too broadly. *Dissent* at 608. The court says that there can be no removal until all Does are either named, unequivocally abandoned, or dismissed in the state court action. *Majority* op. at 605-06. This necessarily means that an action may not be removed as long as a Doe defendant continues to be named in the complaint and remains unidentified. Thus, the court effectively adopts a rule that Doe defendants are conclusively presumed to be real, not phantom or sham, and are conclusively presumed to be nondiverse. I believe that such a conclusive presumption is inconsistent with *Pullman* which I read as requiring that a nonresident defendant must be given the opportunity at the time of

removal to show that no legitimate defendant is a resident. 305 U.S. at 541, 59 S.Ct. at 350 ("It is *always open* to the nonresident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove.") (emphasis provided).[1]

Suppose hypothetically that Ford had filed affidavits with its removal petition showing that the van had been designed and assembled in Michigan, and that all components, including the passive restraint system, had been produced by companies outside of California, and that Bryant's employer purchased the van from a dealer in Detroit, took delivery in Detroit, and drove the van to California. Suppose further that Bryant was unable to come up with any evidence to controvert the facts set forth in Ford's affidavits. It seems to me that had that been the state of the record at the time the district court acted on Ford's removal petition, removal would have been proper and subject matter jurisdiction would have vested in the district court. A defendant's burden to show complete diversity when faced with Doe allegations may be a heavy one, but I see no justification for denying defendants the opportunity to try.

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[1] In *CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F. Supp. 1272, 1274 (N.D.Cal. 1986), Judge Schwarzer gave the defendant the opportunity to show that the Doe allegations should not defeat diversity by proving that all potential defendants encompassed by the charging allegations were diverse or that the charging allegations were shams. *Id.* at 1274. Although in *CTS Printex* the defendant's affidavits failed to establish that no California resident could have committed acts within the charging allegations of the complaint, the defendant in that case was at least given the opportunity to make an evidentiary showing that all conceivably liable Doe defendants were nonresidents. *See id.* at 1274 n.1.

KOZINSKI, Circuit Judge, with whom Circuit Judge O'SCANNLAIN joins, dissenting.

The court has taken this case en banc to resolve a problem that has vexed our district courts for some time: how to treat fictitious parties—so-called Doe defendants—when a case is removed from state court on the basis of diversity of citizenship. That the problem is real and serious is without doubt.[1] Far more in doubt is the court's solution. The court does not explain why it has chosen that particular approach to the problem, nor does it consider alternatives that might better reconcile the relevant state and federal interests.

The court's lack of analysis reflects, perhaps, the dearth of briefing and argument on the issue. The case was presented to the en banc panel on the basis of the petition for rehearing, the opposition thereto and the reply. No additional briefing was called for. The rule the court now adopts as the law of the circuit—the so-called *CTS Printex* rule, named after the district court case where it was first announced, *CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F.Supp. 1272 (N.D. Cal.1986)—was mentioned only in passing in the opposition to the petition for rehearing and the reply. It was not discussed at any detail at oral argument. No one argued against its adoption or presented any argument that might expose its flaws.[2]

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[1] *See, e.g., Othman v. Globe Indem. Co.*, 759 F.2d 1458 (9th Cir. 1985); *Hartwell Corp. v. Boeing Co.*, 678 F.2d 842 (9th Cir. 1982); *Preaseau v. Prudential Ins. Co. of Am.*, 591 F.2d 74 (9th Cir. 1979); *CTS Printex, Inc. v. American Motorists Ins. Co.*, 639 F. Supp. 1272 (N.D.Cal. 1986); *Schmidt v. Capitol Life Ins. Co.*, 626 F. Supp. 1315 (N.D.Cal. 1986); *Brennan v. Lermer Corp.*, 626 F. Supp. 926 (N.D.Cal. 1986); *see generally* Note, *John Doe, Where Are You? The Effects of Fictitious Defendants on Removal Jurisdiction in Diversity Cases*, 34 Ala.L.Rev. 99 (1983); Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 Stan.L.Rev. 297 (1983).

[2] The court is relying, perhaps, on the fact that the rule was adopted by Judge Schwarzer, a careful and respected jurist. But

I respectfully suggest that the court's new rule does, in fact, have serious flaws. As I discuss at greater length below, today's decision will have very serious effects on the operation of the removal statute in any state that allows Doe pleadings, as does California. Moreover, the court's bright-line rule is in large part dicta and its binding force is therefore highly questionable.

The court's approach is particularly troubling because orders remanding cases to the state courts are ordinarily not appealable. 28 U.S.C. § 1447(d) (1982); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52, 96 S.Ct. 584, 593-94, 46 L.Ed.2d 542 (1976). Insofar as the court today defers or entirely forecloses a large number of removals, there may be little or no opportunity to correct any error or fine-tune the rule of decision. This should not deter us from doing what we think is necessary. But it does counsel making very sure that we are right. I am just not sure that we are.

Judge Schwarzer, too, adopted the rule without the benefit of argument by counsel. The issue of how to apply and implement this court's decision in *Lindley v. General Elec. Co.*, 780 F.2d 797 (9th Cir.), *cert. denied*, 476 U.S. 1186, 106 S.Ct. 2926, 91 L.Ed.2d 554 (1986), first came up during the oral argument on the motion to remand. The parties were unaware of the case but Judge Schwarzer announced that he interpreted *Lindley* to require a wholly new approach and would write an opinion. In response to counsel's request that the issue be briefed, he stated as follows:

> I don't care if you want to send me a memorandum. I'm going to issue a written opinion on this, although I'll tell you now informally, I intend to grant the motion to remand, and *I don't want to have you people engage in any briefing about this*, but if you want to make a brief comment in a letter, I won't stop you from doing it . . . *I don't see any need to respond.* You can be guided accordingly.

Reporter's Transcript at 13 (July 3, 1986) (emphasis added). It thus appears that the rule the court adopts today is entirely judge-made: It has never been briefed or argued by any party to any court.

I.

A. The Rationale of the Cases the Court Is Overruling Continues to Have Vitality

The court overrules four lines of closely related authority that attempt to distinguish between two types of Doe defendants: those that are real, but whose precise identities are unknown, and those that are procedural fictions, named only for the purpose of preserving the plaintiff's right to add defendants that he might learn about later. The cases the court overrules today stand for the proposition that where the Does are of the second variety—phantoms named solely to toll the running of the statute of limitations—they will not interfere with the exercise of federal jurisdiction. No one has made the point so eloquently as our venerable Chief Judge Emeritus in *Grigg v. Southern Pacific Co.*, 246 F.2d 613 (9th Cir.1957), the earliest of the cases the court is overruling:

> Perhaps these Does have some proper place under California state practice. But it is hard to believe they serve any purpose when they are included superstitiously and without reason. Certainly their phantoms, when Does live not and are accused of nothing, should not divert the course of justice.

Id. at 620 (Chambers, J.). Similar sentiments are expressed in other cases. *See, e.g., Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 843 (9th Cir.1982); *Chism v. National Heritage Life Ins. Co.*, 637 F.2d 1328, 1330 (9th Cir.1981); *Asher v. Pacific Power & Light Co.*, 249 F. Supp. 671, 676 (N.D.Cal.1965).

This concern, it seems to me, is a legitimate one. While there may be a small number of cases where defendants are known to exist but their names are not available, there are many more cases where Doe defendants alleged in the complaint are simply procedural fic-

tions. My understanding is that nearly every civil case now filed in California contains Doe allegations.[3] The reason is simple: It would be malpractice for a lawyer to omit such allegations if there is even the remotest chance that other defendants might turn up. This means that there is a fair number of cases—perhaps the overwhelming majority—where all the parties that will ever turn up are already before the court and the presence of Doe allegations impairs removal for absolutely no good reason.

The decisions the court overrules today attempted the difficult but important task of distinguishing the cases where Does are real but unidentified parties from those where they are nothing more than procedural fictions. What the court's opinion documents quite clearly, and what our district judges and lawyers have been telling us, is that the fine line-drawing required to separate the goats from the sheep in this fashion is too burdensome and results in too much uncertainty. *See, e.g., CTS Printex*, 639 F.Supp. at 1277.

Fair enough. The need for a bright-line rule, capable of more predictable application, is squarely presented to

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[3] The authors of a leading treatise on California practice, both Superior court judges, state that "[n]aming 'Doe' defendants can be useful in several situations: (1) Where plaintiff does not know the name of the person who injured him or her (or knows them only by nicknames or incorrect names); (2) Where plaintiff knows the name of the persons who injured him or her, but has reason to believe they were not acting alone . . . [and] (3) Where plaintiff does not know all the facts upon which liability depends, and therefore is ignorant of the defendants' liability (even if plaintiff knew their names all along)." R. Weil & I. Brown, *California Practice Guide: Civil Procedure Before Trial* § 6:58.1, at 6-10 (1985). The authors emphasize that "[i]n each of the above situations, naming 'Doe' defendants is a good practice because it 'keeps the door open.' It enables plaintiffs to join other persons when their identities or responsibility is discovered." *Id.*

us. Yet this does not nullify the reasons we adopted the more complex rule in the first place. *Grigg* and its progeny pursued an important objective: preserving the authority of the federal courts to exercise jurisdiction conferred on them by an Act of Congress. That interest ought not be defeated by a state procedural device that in most instances is invoked "superstitiously and without reason." 246 F.2d at 620. We should fashion a rule that takes these concerns into account and minimizes the conflict between the federal interest in the proper exercise of removal jurisdiction and the state interests represented by the Doe pleading practice.

The rule the court adopts fails to do this. Without any discussion, the court abandons the federal interest *Grigg* and its progeny sought to protect. In Judge Chambers' words, the phantoms of Does that "live not and are accused of nothing" are now given substance for the purpose of deferring or defeating federal jurisdiction.

If the court is intent on adopting a bright line rule, there are two from which it can choose: one that treats Doe defendants as *always* destroying diversity, and one that treats them as mere procedural fictions, *never* destroying diversity. I fear that the court has selected the wrong bright-line rule, the one that least well reconciles the relevant state and federal interests.

B. The Court's New Rule Seriously Interferes with the Federal Court's Exercise of Jurisdiction Under the Removal Statute

The court recognizes that its rule "may lead to removal at a late stage in the proceedings." Majority op. at 606, n. 6. Probably more accurate is the observation in *CTS Printex* that, under the new rule, removal "may occur on the eve of trial (if trial occurs within three years of filing of the complaint). . . ." 639 F.Supp. at 1277.

Even if trial is delayed, removal will not always be available after three years. While California law requires that defendants be served within three years, the rule is subject to a variety of exceptions and exclusions. *See Cal.Civ.Proc.Code* §§ 583.220-240 (West Supp.1987).[4] In addition, the three-year rule is also subject to judicial interpretation that provides further refinements and exceptions. *See, e.g., Barrington v. A.H. Robins Co.*, 39 Cal.3d 146, 157, 216 Cal.Rptr. 405, 411, 702 P.2d 563, 568 (1985).

Thus, under the majority's rule, removal will be delayed to the eve of the trial,[5] to three years after filing, or to some far later time. This is very, very late indeed to be bringing cases to federal court under a statute that, by its terms, directs that removals occur within thirty days after the filing of the complaint. This wholesale delay of removals in virtually all diversity cases filed in California (and perhaps other states allowing Doe pleadings)[6] is not only at odds with the plain statutory language, it defeats long-standing congressional policy with respect to removals and will result in a variety of practical problems.

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[4] Section 583.220 allows for waiver of the three-year service period by stipulation or by defendant's general appearance. Pursuant to section 583.230, the parties may agree to extend the time for service. Finally, section 583.240 lists certain additional situations extending the time within which service must be made.

[5] Actually, removal may be delayed to as late as the close of plaintiff's case-in-chief because, at the trial-setting conference, the court may not compel a plaintiff to drop fictitious defendants or condition the setting of trial date upon his doing so. Cal.R.Ct. 220(b).

[6] We do not know how many of the states in our circuit employ a Doe pleading procedure analogous to California's. At oral argument, one of the attorneys stated that eight of the nine states in the circuit have some procedure for suing fictitious defendants, although it is unclear just how closely they resemble California's.

1. *The Majority's Approach Conflicts with the Policy of the Federal Removal Statute*

The federal removal statute, 28 U.S.C. §§ 1441-1452 (1982 & Supp. III 1985), embodies congressional policy that cases brought in state court be transferred to federal court if they could have been brought there in the first place. *See Grubbs v. General Elec. Credit Corp.*, 405 U.S. 699, 92 S.Ct. 1344, 31 L.Ed.2d 612 (1972). This provision dates back to the Judiciary Act of 1789, 1 Stat. 73, 79 (1789), and, except for a short period during the 19th century, has reflected two policies: First, cases should be removed as early as possible in the litigation. *Powers v. Chesapeake & Ohio Ry.*, 169 U.S. 92, 100, 18 S.Ct. 264, 267, 42 L.Ed. 673 (1898); second, federal removal law should be consistent nationwide, unaffected by differences in state law. *Grubbs*, 405 U.S. at 705, 92 S.Ct. at 1348; *Chicago, R.I. & Pac. R.R. v. Stude*, 346 U.S. 574, 580, 74 S.Ct. 290, 294, 98 L.Ed. 317 (1954); *Shamrock Oil & Gas Corp., v. Sheets*, 313 U.S. 100, 104, 61 S.Ct. 868, 870, 85 L.Ed. 1214 (1941). The rule the court adopts today offends both of these policies.

Legislative histories were not in the early days of the Republic what they are today (perhaps fortunately so). We therefore have little to tell us why the drafters of the first Judiciary Act required removal early in the litigation. What we do have, however, is an experiment during the Reconstruction era when removals were allowed any time before trial. The innovation was short-lived. In 1875, the date was moved back closer to the commencement of the litigation. 18 Stat. 471 (1875). Such legislative history as we have shows the obvious: The rule change was occasioned by dissatisfaction with removals so close to trial. In the course of debates on the floor of the House, Congressman Poland declared:

> The third section of this bill provides that in all actions hereafter brought the application for removal

> shall be made at the first term of the court thereafter. That was the old law of 1789, that when the defendant sought a removal of the cause he must do so at the time of entering his appearance. But in later statutes, especially those passed during and since the war, we have provided that applications for removal may be made at any time before trial; which I think, and the committee think [sic], is very mischievous in its consequences. A party will let his case run on in a State court until he is satisfied that he will be beaten, and then dodge off into a Federal court. The third section of this bill provides that in all suits hereafter commenced the practice shall go back to the act of 1789, and parties seeking the removal of causes shall do so at the very outset.

3 Cong.Rec. 4302 (1874).

This has been the law ever since, although the precise formula has varied from time to time.[7] As the Supreme Court stated in *Powers*: "This provision clearly manifests the intention of Congress that the petition for removal should be filed at the earliest possible opportunity." 169 U.S. at 100, 18 S.Ct. at 267. There is good reason for this. Late removals can be extremely disruptive, lead to serious duplication of effort and be manipulated for tactical advantage. *See* pp. 612-18 *infra*.

To be sure, the rule is not absolute; it does allow for slippage where the case becomes removable later in the litigation. *See* 28 U.S.C. § 1446(b). However, it is important to recognize that the exception is just that, an exception. It should not be allowed to swallow up the basic policy of early removal. The court's new rule thwarts this settled policy by postponing removal based

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[7] In 1949, the statute was amended to require removal within twenty days after the filing of the complaint. 63 Stat. 101 (1949). In 1965, the period was extended to thirty days after the filing of the compalint. 79 Stat. 887 (1965).

on diversity of citizenship for at least three years in practically every case coming out of California, a state that is responsible for well over half of the diversity filings in the nation's largest circuit.[8] I can think of no more effective way of undermining the congressional policy of early removal.[9]

The court's rule also undermines the congressional policy that removal procedures be uniform in the federal courts, unaffected by the vagaries of state law. The court's rule gives California—and every other state that has or can adopt a California-style Doe pleading rule—the authority to defer federal removal for years, perhaps indefinitely.[10] Congress did not intend that the right to remove be manipulated by state law in this fashion. As the Supreme Court said in *Shamrock*, "[t]he removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization. . . ." 313 U.S. at 104, 61 S.Ct. at 870.

Moreover, deferring removals on a wholesale basis is more than a question of timing; it significantly affects the very availability of removal, impairing the exercise of a right guaranteed by Congress. Many cases are terminated early in the litigation by dismissal or summary

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[8] 1987 Annual Report of the Ninth Circuit 53.

[9] The court suggests that "[a] defendant may be able to expedite removal . . . by seeking the plaintiff's consent to drop the Doe defendants." Majority op. at 606 n.6. This possibility is an illusion. A plaintiff who chose the state court would have no reason to help facilitate removal. Even if so inclined, why would a plaintiff agree to drop the Doe defendants and give up the benefit of tolling the limitations period?

[10] Three years for adding Does happens to be the current California practice. *But see* pp. 605-06 & nn. 4-6 *supra*. The court's rationale would apply equally, however, if state law permitted five years, ten years or any other period. By making the period long enough, the state can foreclose removals altogether.

judgment on the basis of procedural default or for some other reason. As to those cases, removal is effectively denied under the court's rule even if there is not the slightest possibility that any of the Does will materialize or that they would destroy diversity.

Equally troubling, delaying removal to the eve of trial, or for three or more years into the litigation, changes significantly the incentives for and against removal, subjecting it to the kind of manipulation Congress condemned when it amended the removal statute in 1875. *See* p. 610 *supra*. The decision to remove at the start of litigation is based principally, perhaps entirely, on the choice of forum, the choice Congress meant for defendants to make. On the eve of trial, a decision to remove is based on far different considerations. For one thing, the possible advantages of federal pretrial practice and case management would no longer be relevant. Moreover, a defendant would have to consider whether to remove the case and possibly expose himself to another round of discovery in district court or, conversely, whether to remove in order to subject the plaintiff thereto.

Also relevant at that point would be the outcome of various pretrial rulings. A defendant who found himself on the losing side of such rulings might view removal as an opportunity to relitigate those issues. *See* pp. 612-13 *infra*. Perhaps most obviously—and least appropriately—removals on the eve of trial can be used as devices for oppression by further delaying a plaintiff's day in court,[11] precisely what Congress worried about when it moved the removal date back to the start of the litigation.[12] If there

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[11] Standing the maxim on its head, defense lawyers are fond of quipping that justice delayed is justice.

[12] Fears that defendants will remove cases as they are about to go to trial are not imaginary. A number of the reported cases involved such removals. *See, e.g., Powers*, 169 U.S. at 94, 18 S.Ct. at 264; *Preaseau*, 591 F.2d at 75 (case removed during recess on first morning of trial).

are sufficient reasons for adopting a rule that so runs against the grain of the removal statute, the court does not explain what they are.

2. *The Court's Rule Will Create Serious Practical Problems*

Deferring removal of all diversity cases for three years will create a number of procedural problems. For starters, this will generate a substantial duplication of effort. When a case is removed to federal court, all interlocutory ruling of the state court are subject to reconsideration by the district judge. 28 U.S.C. § 1450; *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 435-37, 94 S.Ct. 1113, 1122-23, 39 L.Ed.2d 435 (1974); *Preaseau*, 591 F.2d at 79; 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.168[4.-1], at 640 (2d ed. 1987). This would include discovery rulings, decisions on summary judgment motions and interlocutory stays and injunctions. The later the removal, the more interlocutory rulings there are likely to be, and the greater the opportunity for relitigation. While federal judges may generally defer to their state colleagues on these matters, losing litigants have every incentive to seek reconsideration in the new forum. In *Preaseau*, for example, they did so and were successful. 591 F.2d at 79-83. But win or lose, the attempt will consume the time of the court and the money of the parties. When state and federal courts are barely able to handle their burgeoning caseloads, and there are frequent and justified complaints about the cost and delay of litigation, the court should be reluctant to fashion a rule that will cause such wholesale duplication of effort.

We also should not underestimate the disruption caused by plucking cases from the state courts many years after the start of litigation. Discovery may be discontinued or disrupted; pending motions would have to be withdrawn from the state court and refiled or reargued before the district court; injunctions, stays, receiverships and

other equitable remedies would have to be transferred and conformed to federal procedural and bonding requirements. Various rulings may be in the process of interlocutory appeal to the state appellate courts; such appeals would be short-circuited by removal. Any trial date set by the state court would have to be cancelled, with the attendant disruption to parties and witnesses, and the case would normally take its place at the bottom of the district court's civil docket. And, all of this assumes both parties are acting in the best of faith; if one side wants to use the removal as an excuse for dragging its feet, it will find plenty of reasons for doing so. While it is difficult to predict with any accuracy what procedural problems this will spawn, it is a fair guess that there will be many more than if the cases were removed thirty days after filing of the complaint, as Congress intended.[13] Some of these problems may occur now when the right to remove does not arise until late in the litigation. But, again, these are exceptions, rare situations that may involve an occasional disruption. It is quite a different matter when removal is delayed in virtually *every* diversity case coming out of California (and perhaps other Doe states) for three years or more.

C. The Court's New Rule Has Serious Flaws

All that having been said, I might nevertheless be willing to go along with the court's rule if I thought it repre-

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[13] It is also worth considering that, under the court's rule, removal hinges entirely on the ruling of the state court on any motion to dismiss the Doe defendants after the three-year time period has expired. As noted earlier, this is not necessarily a routine motion calling merely for a calculation of time: There are a number of exceptions to the three-year rule, and the state court may have to make some close judgments as to whether the Does are properly out of the case. *See* pp. 605-06 & nn. 4-6 *supra*. What if the state court errs in that ruling? It seems odd to vest the state court with unreviewable authority to determine the timing of removal, a question of federal law.

sented a tenable reading of the removal statute. It does not. Indeed, in order to make the rule work at all, the court has to address situations not presented by this record; much of the court's supposedly bright-line rule is therefore dicta.

While the court's rule appears to be simple enough, it in fact deals with two rather distinct issues: (1) whether inclusion of Doe parties in the complaint destroys diversity; and (2) when Does originally pled may be deemed eliminated so that an originally non-diverse case becomes diverse. The court is certainly in a position to address the first question: We have here Doe allegations that, arguably, were sufficiently specific to destroy diversity. If the court wants to say that Doe allegations, no matter how unspecific, will always destroy diversity, it certainly may do so, although I would question the wisdom of the rule.

But the court goes much further than this. In an effort to adopt a simple rule that will solve all problems, the court goes on and addresses the second question: when Doe allegations disappear from a case by abandonment or otherwise. But the court is in no position to speak on this issue because the case before us does not present the issue of abandonment: No one has claimed that the Doe defendants have been abandoned and every indication is that the plaintiff fully intends to rely on the Doe allegations. Under these circumstances, that part of the court's bright-line rule dealing with this issue is, quite simply, dicta, and very mischievous dicta at that. Perhaps because the issue is not presented to us in a concrete controversy, the rule the court adopts runs rough-shod over the statutory langauge and demonstrably excludes a variety of situations where federal jurisdiction is authorized by the removal statute.

The removal statute provides that if the case is originally not removable, the defendant may remove within 30 days after he receives "a copy of an amended plead-

ing, motion . . . or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b). The court here reformulates this statutory standard as follows: "The 30-day time limit for removal . . . will not commence until all Doe defendants are either named, unequivocally abandoned by the plaintiff, or dismissed by the state court." Majority op. at 605-06 (footnote omitted). The first of these possibilities is tantalizing but meaningless. The typical complaint filed in the California courts pleads Does by the dozens, sometimes by the hundreds, far outnumbering the defendants that could conceivably be brought into the case. There are fifty Does in this case alone. *See* p. 615 n. 14 *infra*. The last possibility—dismissal of the Does—is real enough, but only materializes after the period for serving Does has expired.

It is the second possibility—"unequivocal abandonment"—that is the most troublesome, however. In a footnote, the court explains that "[u]nequivocal abandonment occurs in only two situations: (1) where the plaintiff drops the Doe defendants from the complaint or (2) where the trial commences without service of the Doe defendants." Majority op. at 606 n. 5 (citation omitted). The court's restrictive approach is difficult to reconcile with statutory language which provides that a case may be removed within 30 days after the defendant receives "a copy of an amended pleading, motion . . . or other paper from which it may first be ascertained that the case is one which is or has become removable." This language, I submit, covers a wide variety of situations, not just the two enumerated in footnote 5 of the court's opinion. Consider the following:

> Plaintiff writes defendant a letter advising him that he is abandoning the unserved Doe defendants. Defendant writes back requesting that plaintiff formally amend the complaint to drop the Does but

> plaintiff refuses to do so. This situation clearly seems to fit the statutory language as an event triggering the right to remove, yet, under the court's new rule, this would not be considered "unequivocal abandonment."
>
> Defendant propounds requests for admission asking plaintiff to admit that there are no unknown parties left unserved. Plaintiff does not deny. Ditto.
>
> Plaintiff files an at-issue memorandum containing the following certification: "Plaintiff is aware of no unserved parties that will be brought in the case and abandons its claims against any parties who have not been served as of this date." Ditto.

These are not wild examples; they, and countless others like them, happen every day. Our district courts and litigants will be required to confront them. The court's opinion will no doubt create a serious dilemma to those seeking to apply its teachings. On the one hand, the opinion speaks with the authority of the full court, and its rulings must be taken very seriously. On the other hand, this aspect of its ruling is so obviously dicta, and so obviously fails to follow the clear statutory language, that courts and litigants may well be tempted to shrug it off as not really meaning what it says. While defiance of binding authority is never appropriate, blindly following dicta also has its hazards.

That the court must resort to dicta to make its rule workable should be a further indication that its rule may be flawed. The difficulty, as I see it, is that the court is the captive of precedent that it is authorized to overrule but fails to reconsider. Specifically, the court fails to consider the fundamental question of the proper status of Doe defendants when a case is removed to federal court. I attempt to do so below.

II.

There are two diametrically opposed models of how Doe defendants should be viewed by the federal courts. On the one hand, they could be treated like real parties—actual flesh and blood people—whose names happen to be unknown. On the other hand, Does could be viewed as procedural fictions, magic words used by lawyers in pleadings for the sole purpose of tolling the statute of limitations against parties that might conceivably turn up. While there may be a small number of cases falling into the former category, the vast majority of Does that populate the state courts of California are of the latter type. Doe allegations, of which those here are typical,[14] generally do not represent real people, diverse or otherwise. They should not, therefore, automatically be treated as if they

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[14] Paragraphs 1 and 2 of the complaint, containing what I believe are fairly standard Doe allegations, provide as follows:

> 1. The true names and/or capacities, whether individual, corporate, associate or otherwise of defendants, DOES 1 through 50, inclusive, and each of them, are unknown to plaintiff who therefore sues said defendants by such fictitious names. Plaintiff is informed and believes, and upon such information and belief alleges, that each of the defendants fictitiously named herein as a DOE is legally responsible, negligently or in some other actionable manner, for the events and happenings hereinafter referred to and proximately caused the injuries and damages to plaintiff as hereinafter alleged. The plaintiff will seek leave of Court to amend this Complaint to insert the true names and/or capacities of such fictitiously named defendants when the same have been ascertained.
>
> 2. Plaintiff is informed and believes, and thereupon alleges, that at all times mentioned herein, defendants, and each of them, including DOES 1 through 50, inclusive, and each of them, were the agents, servants, employees and/or joint venturers of their codefendants, and were, as such, acting within the course, scope and authority of said agency, employment and/or venture and that each and every defendant, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every other defendant as an agent, employee and/or joint venturer.

do. That decision should be made on the basis of whether to do so is consistent with the Federal Rules of Civil Procedure and other relevant federal interests, including the unimpaired operation of the federal removal statute.

The Federal Rules of Civil Procedure do not provide for suing fictitious parties. Indeed, the practice is inconsistent with many of the rules and incompatible with federal procedure. *See, e.g.*, Fed.R.Civ. P. 10(a) ("[i]n the complaint the title of the action shall include the names of all the parties. . . ."); pp. 617-18 *infra*. We have repeatedly held that a suit naming Doe defendants may not be maintained in federal court. *See, e.g., Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1191 (9th Cir. 1970); *Craig v. United States*, 413 F.2d 854, 856 (9th Cir.), *cert. denied*, 396 U.S. 987, 90 S.Ct. 483, 24 L.Ed. 2d 451 (1969); *Molnar v. National Broadcasting Co.*, 231 F.2d 684, 686-87 (9th Cir. 1956). Nevertheless, in a more recent case, we held that a plaintiff is entitled to the benefit of the California Doe pleading practice when his case is removed to federal court. *Lindley*, 780 F.2d 797.

This is a critical assumption. If plaintiffs may, as a matter of right, substitute the names of real people for the Does, then the Does must be treated as real people for purposes of determining diversity of citizenship, for they may well become real at the plaintiff's option. But, it seems to me, Doe defendants are more readily treated as nullities for purposes of federal practice, seeing as they are not authorized or contemplated by our Federal Rules of Civil Procedure. If that were the case, the problems with which we have been grappling would disappear; the court could look only at the named parties for purposes of determining diversity at the time of removal; additional parties could be added later under the Federal Rules, just as in any other diversity case brought in district court.[15]

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[15] The fact that parties that could destroy diversity may be added has never been a bar to removal. *Salem Trust Co. v. Manufacturers'*

While the court does not discuss *Lindley*, the *Lindley* opinion plainly is the predicate for its ruling today.[16] It becomes crucial, therefore, to consider whether *Lindley* was correctly decided.

California's Doe pleading practice addresses a specific issue that arises during the coure of litigation: How does the filing of the lawsuit affect the running of the statute of limitations as to potential defendants whose identity is unknown at the time suit is brought? The California rule is that, for three years after filing, the plaintiff may amend the complaint by adding any such parties as a matter of right. Cal.Civ.Proc.Code §§ 474, 583.210 (West 1979 & Supp. 1987). In federal court, the same problem is addressed and resolved by Fed.R.Civ.P. 15(c). Under the Federal Rule, an amendment to the complaint adding a party relates back to the date of the original pleading only if, *inter alia*, the party to be added: (1) has received notice of the action; and (2) knew or should have known that, but for the mistake in naming the original party, the action would have been brought against him.

When a diversity case is initially filed in federal court, Rule 15(c) clearly supersedes state law on relation back. *See, e.g., Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 738-39 (9th Cir. 1982); *Britt v. Arvanitis*, 590 F.2d 57, 61-62 (3d Cir. 1978). However, *Lindley* holds that when the case is first filed in state court and then removed, the Doe pleading rule is imported into the case as a matter of state substantive law, trumping Rule 15(c). 780 F.2d at 800-01.

Finance Co., 264 U.S. 182, 189, 44 S.Ct. 266, 267, 68 L.Ed. 628 (1924) ("[t]he right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed").

[16] Judge Schwarzer certainly thought so in crafting the *CTS Printex* rule. He opened the oral argument on the motion for remand by citing *Lindley* and asking the lawyers to comment "if you aren't totally shellshocked by this bombshell. . . ." RT at 3. He then made it clear that he considered *Lindley* to be the premise of the rule he announced in his opinion. *See* p. 604, n.2, *supra*.

The *Lindley* approach is foreclosed by the Supreme Court's decision in *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct 1136, 14 L.Ed.2d 8 (1965). *Hanna* addressed the question of what happens when there is a conflict between state law and the Federal Rules of Civil Procedure. It holds that if there is a direct conflict between the Federal Rules and state law, the Federal Rule takes precedence unless, of course, the Federal Rule is invalid. The following passage from *Hanna* could not be clearer on this point:

> It is true that both the [Federal Rules] Enabling Act [28 U.S.C. § 2072] and the *Erie* rule say, roughly, that federal courts are to apply state "substantive" law and federal "procedural" law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. *When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided* Erie *choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Conress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.*

380 U.S. at 471, 85 S.Ct. at 1144 (emphasis added; footnote omitted). *See generally* 3 J. Moore, *Moore's Federal Practice* ¶ 15.15[2], at 15-142 (2d ed. 1987) ("*Hanna v. Plumer* is dispositive of the issue and . . . the matter is . . . one solely of federal practice under Rule 15(c)") (footnote omitted).

Earlier this year, the Supreme Court unanimously reaffirmed the vitality of *Hanna* and further explained its scope and rationale. *See Burlington Northern R.R. v. Woods*, — U.S. ——, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987). *Burlington Northern* dealt with an Alabama statute re-

quiring that a 10 percent penalty be assessed against an unsuccessful appellant who had obtained a stay of the judgment pending appeal. The appellee in a federal diversity case removed from state court claimed the benefit of this rule, arguing that he was entitled to it as a matter of substantive state law. Speaking for the Court, Justice Marshall held that the application of the Alabama statute was foreclosed under *Hanna* by Federal Rule of Appellate Procedure 38, which provided that "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

The Court first noted that "[t]he cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act's requirement that the rule not abridge, enlarge or modify a substantive right] *if reasonably necessary to maintain the integrity of that system of rules.*" 107 S.Ct. at 970 (emphasis added). The Court then noted that Rule 38's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute. Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purpose of the Alabama statute to indicate that *the Rule occupies the* [*state*] *statute's field of operation so as to preclude its application in federal diversity actions.*" *Id. at* 970-71 (emphasis added).[17] The Court

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[17] In an important footnote, the Court also found the Alabama statute inconsistent with the operation of several of the other federal rules, specifically those dealing with prejudgment interest and stays pending appeal:

> Rule 37 of the Federal Rules of Appellate Procedure provides further indication that the Rules occupy the Alabama statute's field of operation so as to preclude its application in diversity actions. Since the affirmance penalty only applies if a trial court's judgment is stayed pending appeal, see Ala.Code § 12-

rejected the argument that the state and Federal Rules were not truly in conflict because "a federal court sitting in diversity could impose the mandatory penalty and likewise remain free to exercise its discretionary authority under Federal Rule 38." *Id.* at 971. The Court stated:

> This argument . . . ignores the significant possibility that a Court of Appeals may, in any given case, find a limited justification for imposing penalties in an amount *less than* 10% of the lower court's judgment. Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals; the Alabama statute precludes any exercise of discretion within its scope of operation.

Id. (emphasis original).

Burlington Northern puts an important gloss on *Hanna*. It stands for the proposition that there may be a conflict between the Federal Rules and state law even if there is no direct contradiction. The relevant questions are whether the Federal Rule "is reasonably necessary to maintain the integrity of [the federal] system of rules," and whether it "occupies the [state] statute's field of operation." *Id.* at 970.

22-72 (1986), it operates to compensate a victorious appellee for the lost use of the judgment proceeds during the period of appeal. Federal Rule 37, however, already serves this purpose by providing for an award of postjudgment interest following an unsuccessful appeal. See also 28 U.S.C. § 1961.

In addition, we note that federal provisions governing the availability of a stay of judgment pending appeal do not condition the procurement of a stay on exposure to payment of any additional damages in the event the appeal is unsuccessful and, unlike the state provision in this case, allow the federal courts to set the amount of security in their discretion. Compare Fed.Rules Civ.Proc. 62(d) and 62(g) and Fed.Rule App.Proc. 8(b) with Ala.Rule App.Proc. 8(b). See also 28 U.S.C. § 1651.

107 S.Ct. at 971 n.5

Under this standard, it is clear that California's Doe pleading practice is supplanted by the Federal Rules of Civil Procedure once the case is removed to federal court. *Lindley*'s contrary conclusion, 780 F.2d at 800-01, reached without the benefit of the Supreme Court's discussion in *Burlington*, is no longer plausible. We not only have direct conflicts between the operation of the state statute and the Federal Rules, *see* pp. 617-18 *infra*, we also have serious disruptions of federal procedures and, as of today, a wholesale subservience to state law of an Act of Congress dating back to the earliest days of the Republic. Compared to this, the conflict between state and federal law in *Burlington Northern* seems like a trifle.

The conflict between state and federal procedure in this case is clear. California's Doe pleading rule has two components. First, Cal.Civ.Proc.Code § 474 provides that a defendant may be designated by a fictitious name; the real name may be substituted whenever the true identity is discovered. Next, Cal.Civ.Proc.Code § 583.210 provides that a plaintiff has up to three years after filing to serve the summons and complaint on any defendant. California courts have interpreted this to extend the time available to replace Doe defendants with named parties. *Lesko v. Superior Court*, 127 Cal.App.3d 476, 481-82, 179 Cal.Rptr. 595, 598 (1982). The analogous Federal Rules are Fed.R.Civ.P. 4(j), 15(c), 19, 20 and 21.

Rule 4(j)[18] provides that the defendant must be served within *120 days* of the filing of the complaint; absent good cause, failure to serve within this time renders the complaint subject to dismissal. This provision cannot be reconciled with Cal.Civ.Proc. Code § 583.210, which allows three years for service.[18]

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[18] In *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), the Supreme Court considered the relationship between Fed.R.Civ.P. 4(j)'s time-to-serve rule and a state statute of limitations. Rejecting the dissent's contrary argument, the Court held that the time allotted by Rule 4(j) to serve the complaint does *not*

Rules 19, 20 and 21 prescribe when new parties may or must be added to complaints filed in federal court. The rules are comprehensive and give the district court broad authority to accept or reject new parties. By contrast, Cal.Civ.Proc.Code § 474 has no restrictions whatsover; the court has no discretion; the plaintiff can bring in newly-identified parties at will. The Federal Rules and California statutes thus address exactly the same problem and resolve it in different ways, clearly occupying the same "field of operation."

Finally, Federal Rule 15(c) determines the extent to which parties added by amendment are subject to the complaint's original filing date. Under the Federal Rule, an amendment to the complaint adding a party relates back to the date of the original complaint only if, *inter alia*, the party to be added: (1) has received notice of the action; and (2) knew or should have known that, but for the mistake in naming the original party, the action would have been brought against him. The state rule requires no such notice to the new party; the amendment relates back in all cases. Here again, the Federal Rules and state law reach inconsistent solutions to the same problem.

When federal law and state law address precisely the same issues and resolve them in different and inconsistent ways, the state statute would seem to be clearly preempted under the Supreme Court's analysis in *Burlington*

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extend the substantive statute of limitations. *Compare id.*, 106 S.Ct. at 2385 (majority opinion) *with id.* at 2388 (Stevens, J., dissenting). *Schiavone* strongly suggests that a provision allowing a specific time for service is not the equivalent of a statute of limitations for purposes of federal law. California courts agree. *See, e.g., Atchison, T. & S.F. Ry. v. Rollaway Window Screen Co.*, 101 Cal.App.2d 763, 765-66, 226 P.2d 763, 765 (1951); *Rio Del Mar Country Club v. Superior Court*, 84 Cal.App.2d 214, 220, 190 P.2d 295, 300 (1948) ("[i]t has been expressly held that § 581(a) is not a statute of limitations"); *Gonsalves v. Bank of Am.*, 16 Cal.2d 169, 172, 105 P.2d 118, 120 (1940).

Northern. Lindley, however, rejects this conclusion. 780 F.2d at 800-01. Not surprisingly, this leads to a variety of anomalies. Perhaps the most serious of these is that if—as *Lindley* holds—Doe pleadings must be permitted in federal court, this must surely apply to *all* diversity cases, not merely those initiated in state court and then removed to federal district court. Fed.R.Civ.P. 4(j) then would become inapplicable to all California diversity cases, plaintiffs in all such cases having three years, not 120 days, to serve the complaint.

Similarly, if *Lindley* has identified a rule of substantive state law that we must apply under *Erie*, all California diversity plaintiffs, not merely those where the case is removed from state court, should be entitled to file a complaint in federal court naming Doe defendants, and have an absolute right to bring in real parties within three years, regardless of whether they would otherwise be permitted to do so under Fed.R.Civ.P. 19, 20 and 21. Circuit authority is squarely to the contrary. In *Molnar*, 231 F.2d at 686-87, we held that a district court diversity complaint containing Doe allegations is subject to dismissal. *Accord Fifty Assocs.*, 446 F.2d at 1191. Based on these decisions, the local rules of at least three of our district courts prohibit Doe pleadings. D.Ariz.R. 10(d); C.D.Cal.R. 3.7.2.1; S.D.Cal.R. 200-6. If *Lindley*'s rationale is accepted, it overrules *Molnar* and *Fifty Associates*, and invalidates these local rules.

Lindley creates yet another conflict with one of our cases interpreting the Federal Rules. *Santana*, 686 F.2d 736, considered whether Rule 15(c) could be applied in a diversity case to extend the state statute of limitations where state law had no equivalent relation-back doctrine. Analyzing the situation under *Hanna*, we held in *Santana* that the Federal Rule trumped state law: "We conclude that *Hanna* commands application of Rule 15(c) in the face of a contrary state rule, and is thus applicable in the present case." *Id.* at 740.

Lindley attempts to distinguish *Santana* by arguing that Rule 15(c) trumps state law when it extends the state statute of limitations but not when it shortens it. 780 F.2d at 801. This takes an incongruous view of state law. Statutes of limitations provide rights for plaintiffs (to bring suit within a specified time) and for defendants (repose after that time runs). *Lindley* and *Santana* can only be reconciled under the theory that plaintiffs' state law rights are more important than those of defendants. The Federal Rules embody no such onesided principle. It seems to me that either *Santana* is right or *Lindley* is, but not both.

Finally, we ought not overlook the confusion Doe pleadings have caused in the district courts, confusion so severe that we convened an en banc panel to deal with the problem. It is also relevant that the en banc panel is so troubled by the problem that it has adopted a mechanical rule that will have a major impact on the operation of the removal statute, a statute that has reflected congressional policy going back to the first judiciary act. Before taking this step, it is worth considering an alternative.

Overruling *Lindley* would do much to resolve the confusion in this area of the law. If a plaintiff imports with him no right to substitute real parties for fictitious ones in federal court, the fictitious defendants have no meaning and can be disregarded in determining diversity of citizenship.[19] If and when new parties are later discov-

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[19] It is important to distinguish suing fictitious parties from real parties sued under a fictitious name. There may be times when, for one reason or another, the plaintiff is unwilling or unable to use a party's real name. *See, e.g., Roe v. Wade*, 410 U.S. 113, 120 n.4, 93 S.Ct. 705, 710 n.4, 35 L.Ed.2d 147 (1973). Also, one may be able to describe an individual (e.g., the driver of the automobile) without stating his name precisely or correctly. *See, e.g., Pullman Co. v. Jenkins*, 305 U.S. 534, 59 S.Ct. 347, 83 L.Ed. 334 (1939). Providing the name for an otherwise identified party would not raise any of the problems associated with substituting a real party for a fictitious one.

ered, they may be added in accordance with the Federal Rules of Civil Procedure. For the great majority of cases, where all the parties are known and the Does are procedural fictions, exclusion of the Does from the federal litigation would have no effect whatsoever.

This resolution of the problem has the benefit of both simplicity and completeness. It would eliminate *all* the problems associated with the addition of Doe defendants, not just some of them. It would not matter whether the Doe allegations were specific or general; nor would a defendant have to guess whether a particular statement or pleading by the plaintiff constitutes an abandonment or waiver of his right to pursue Does, triggering the right to removal. Moreover, the decision as to removal under this rule would be made when Congress intended: very early in the litigation, before the case had an opportunity to grow roots on the state court's docket. Finally, it would make removals consistent nationwide and avoid giving states and litigants the power to manipulate the timing of federal removals. *See* p. 613 n.13 *supra.*

This approach would not necessarily deny plaintiffs the right to pursue unknown parties as they are permitted by state law. In the first place, the Federal Rules contain liberal joinder provision and in many cases—probably most cases—a plaintiff may be able to join a newly discovered party after the litigation has begun. In any event, the rule would only apply to the federal courts. It does not, and cannot, speak to what rights the plaintiffs may have under state law. That, it seems to me, is a problem for the state courts and the state legislatures to work out. Finally if, in individual cases, the district court is concerned that application of the federal rule will work undue hardship on a plaintiff, it can remand the Doe allegations and allow the plaintiff to pursue the case against the Does in state court.

Conclusion

The court continues to take the law of removal in the wrong direction. Convened to solve a problem, the court only exacerbates it. While the rule it adopts may initially lessen somewhat the burdens on the district courts, it surely will not solve all the problems and may create many more. And it may well be a false economy; duplication of effort resulting from late removals may create as much work as it saves. Moreover, the court's rule sacrifices, unnecessarily I submit, important federal rights. While the decision may please those unsympathetic to diversity jurisdiction, it is inconsistent with the law as Congress has written it. I respectfully, but firmly, dissent.

APPENDIX C

No. 88-97

FORD MOTOR COMPANY

Petitioner,

v.

GARY BRYANT

Case below, 794 F.2d 450; 818 F.2d 692; 832 F.2d 1080; 844 F.2d 602.

Oct. 3, 1988. The motion of American Bar Association for leave to file a brief as *amicus curiae* is granted. Petion for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted.

No. 88-97

FORD MOTOR COMPANY

Petitioner,

v.

GARY BRYANT

Former decision, 109 S.Ct. 54

Case below, 794 F.2d 450; 818 F.2d 692; 832 F.2d 1080; 844 F.2d 602.

Dec. 5, 1988. The order of October 3, 1988 granting the petition for a writ of certiorari is vacated. The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

Justice BLACKMUN dissents.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GARY BRYANT,

Plaintiff,

v.

FORD MOTOR COMPANY, a corporation,

Defendant.

No. 84 2049 PAR (Mcx)

JUDGMENT

The motion of defendant Ford Motor Company ("Ford") for summary judgment and summary adjudication of issues came on for hearing on August 20, 1984, before the Honorable Pamela A. Rymer, United States District Judge presiding, and the issues having been duly heard and a decision having been duly rendered.

IT IS HEREBY ORDERED AND ADJUDGED that:

1. The plaintiff's negligence claim as alleged in the first cause of action in the complaint herein shall be dismissed as a matter of law.

2. The plaintiff's breach of warranty claim as alleged in the second cause of action in the complaint herein shall be dismissed as a matter of law.

3. The plaintiff's strict liability claim as alleged in the third cause of action in the complaint herein shall be dismissed as a matter of law.

4. Ford is entitled to summary adjudication of the issues and dismissal of the first, second and third causes of action.

Dismissal of these causes of action shall be entered accordingly.

Dated: August 21, 1984.

/s/ Pamela Ann Rymer
PAMELA A. RYMER
United States District Judge

APPENDIX E

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C.

Note: New language added by Section 1016 of P.L. 100-702 is italicized. Deletions are bracketed.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action in pending. *For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.*

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations

of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such action because the State court from which such civil action is removed did not have jurisdiction over that claim.

§ 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) *A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a).* If at any time before final judgment it appears that [the case was removed improvidently and without jurisdiction the district court shall remand the case, and may order the payment of just costs.] *the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.* A certified copy of the order of remand shall be mailed by [its] *the* clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section

1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

CALIFORNIA CODE OF CIVIL PROCEDURE:

§ 474. Pleadings Against Person of Unknown Name—True Name Correction

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly; provided, that no default or default judgment shall be entered against a defendant so designated, unless it appears that the copy of the summons or other process, or, if there be no summons or other process, the copy of the first pleading or notice served upon such defendant bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)." The certificate or affidavit of service must state the fictitious name under which such defendant was served and the fact that notice of identity was given by endorsement upon the document served as required by this section. The foregoing requirements for entry of a default or default judgment shall be applicable only as to fictitious names designated pursuant to this section and not in the event the plaintiff has sued the defendant by an erroneous name and shall not be applicable to entry to a default or default judgment based upon service, in the manner otherwise provided by law, of an amended plead-

ing, process or notice designating defendant by his true name.

§ 583.210. Summons and Complaint Served and Returned—Time

(a) The summons and complaint shall be served upon a defendant within three years after the action is commenced against the defendant. For the purpose of this subdivision an action is commenced at the time the complaint is filed.

(b) Return of summons or other proof of service shall be made within 60 days after the time the summons and complaint must be served upon a defendant.

APPENDIX F

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Ford Motor Company (U.S. Supp. Ct. Rule 28.1)

Oy Ford Ab
Ford Motor Company Aktiebolag
Eveleth Taconite Company
Renaissance Center Partnership
Fairlane Woods Associates (A Partnership)
Park Ridge Corporation
Ford Motor Company Limited
Ford Motor Credit Company Limited
Henry Ford & Son (Finance) Limited
Ford-Werke AG
Ford Credit Bank AG
Ford Motor Company of Canada, Limited
Ensite Limited
Ford Motor Company of Australia Limited
Ford Motor Company of New Zealand Limited
Ford France S.A.
Ford Motor Company (Belgium) N.V.
Ford Credit N.V.
Ford Italiana S.p.A.
Ford Credit S.p.A.
Ford Leasing S.p.A.
Ford Motor Company A/S
Ford Credit A/S
Ford Motor Company S.A. de C.V.
Ford Nederland B.V.
Ford Credit B.V.
Ford Leasing S.A.
Ford Credit S.A.
Transcon Insurance Limited
Ford Lio Ho Motor Company, Ltd.
Bayou City Ford Truck Sales
Beltway Ford Truck Sales

Bi-State Ford Truck Sales
Bridge-Haven Ford Truck Sales
Central Ford Truck Sales
Coastal Ford Truck Sales
Crossroads Ford Truck Sales
Deacon Ford Truck Sales
Freeway Ford Truck Sales
Keystone Ford Truck Sales
Lakeland Ford Truck Sales
Liberty Ford Truck Sales
Mid-America Ford Truck Sales
Mid-Cal Ford Truck Sales
Mid-States Ford Truck Sales
Miramar Ford Truck Sales
Mission Valley Ford Truck Sales
Motor City Ford Truck, Inc.
Northside Ford Truck Sales
River City Ford Truck Sales
Sacramento Valley Ford Truck Sales
Shamrock Ford Truck Sales
Sooner State Ford Truck Sales
Southside Ford Truck Sales
Trans-West Ford Truck Sales
West Gate Ford Truck Sales
Delta Truck Lease, Inc.

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth below:

Dealer	City	State
Airport Lincoln-Mercury Sales	Coraopoli	PA
Albion Ford-Mercury, Inc.	Albion	MI
Allegan Ford-Mercury Sales, Inc.	Allegan	MI
Alpena Ford Lincoln-Mercury, Inc.	Alpena	MI
Altoona Ford, Inc.	Altoona	PA
Auburn Ford Lincoln-Mercury, Inc.	Auburn	AL
Aurora Lincoln-Mercury, Inc.	Aurora	CO
Avalon Lincoln-Mercury, Inc.	Carson	CA
Baranco Lincoln-Mercury, Inc.	Duluth	GA
Beloit Ford Lincoln-Mercury, Inc.	South Del	IL
Berens Lincoln-Mercury, Inc.	Chicago	IL
Buffalo Ford-Mercury, Inc.	Buffalo	MN
C & L Lincoln-Mercury, Inc.	Effingham	IL
Campus Ford, Inc.	Okemos	MI
Centralia Ford-Mercury, Inc.	Centralia	WA
Champion Ford Sales, Inc.	Niles	IL
Clinton Ford Lincoln-Mercury, Inc.	Clinton	MO
Coastal Ford, Inc.	Mobile	AL
Columbus Ford-Mercury, Inc.	Columbus	KS
Conway Ford, Inc.	Conway	SC
Copper Country Ford Lincoln-Mercury, Inc.	Houghton	MI
Cornelia Ford Lincoln-Mercury, Inc.	Cornelia	GA
County Ford, Inc.	Jennings	MO
Courtesy Ford Lincoln-Mercury, Inc.	Danville	IL
Crossroads Ford-Mercury, Inc.	Jesup	GA
Crown Lincoln-Mercury, Inc.	Sioux City	IA
Del Perry Ford, Inc.	West Memphis	AR
Delaware Ford, Lincoln-Mercury, Inc.	Delaware	OH
Delta Ford Sales, Inc.	Vicksburg	MS
Duryea Ford, Inc.	Brockport	NY
Dyersburg Ford Lincoln-Mercury, Inc.	Dyersburg	TN
Edgar Ford, Inc.	Breaux Br	LA
El Dorado Ford Lincoln-Mercury, Inc.	El Dorado	AR
Empire Ford, Inc.	Spokane	WA
Fort Valley Ford, Inc.	Fort Valley	GA

Dealer	City	State
Francis Scott Key Lincoln-Mercury Inc.	Frederick	MO
Freedom Ford Sales, Inc.	South Gate	CA
Frontier Lincoln-Mercury, Inc.	Depew	NY
Ft. Walton Beach Lincoln-Mercury, Inc.	Ft. Walton	FL
Geneva Ford Sales, Inc.	Geneva	NY
Gold Star Ford Lincoln-Mercury, Inc.	Shenandoah	PA
Green River Ford-Mercury, Inc.	Campbells	KY
Harbor Lincoln-Mercury, Inc.	Lorain	OH
Heritage Ford-Mercury, Inc.	Corydon	IN
Heritage Lincoln-Mercury, Inc.	Columbus	MS
Highland Lincoln-Mercury, Inc.	Highland	IN
Hilltop Ford, Inc.	Denison	TX
Hub City Ford-Mercury, Inc.	Crestview	FL
Illini Lincoln-Mercury Sales, Inc.	Champaign	IL
Independence Ford, Inc.	Clio	MI
Jim Warren Ford-Mercury, Inc.	Monmouth	IL
Lakeland Ford Lincoln-Mercury, Inc.	Herrin	IL
Leader Ford, Inc.	St. Louis	MO
Liberty Ford Lincoln-Mercury, Inc.	Centralia	IL
Lompoc Ford, Inc.	Lompoc	CA
Los Banos Ford Lincoln-Mercury, Inc.	Los Banos	CA
Madison Ford Mercury, Inc.	Rexburg	ID
Manhattan Ford Lincoln-Mercury, Inc.	New York	NY
Marion Lincoln-Mercury, Inc.	Marion	IN
McGehee Auto Plaza, Inc.	McGehee	AR
Miramar Lincoln-Mercury, Inc.	San Diego	CA
Monticello Ford Lincoln-Mercury, Inc.	Monticello	NY
Natchitoches Ford Sales, Inc.	Natchitoches	LA
New Castle Ford Lincoln-Mercury, Inc.	New Castle	IN
Noble Ford Lincoln-Mercury West, Inc.	Earlham	IA
Norris Lake Ford Lincoln-Mercury, Inc.	Lafollett	TN
North Alabama Ford-Lincoln-Mercury, Inc.	Athens	AL
Northampton Ford, Inc.	Northampton	MA
Odessa Ford Mercury, Inc.	Odessa	DE
Olympic Ford of Marysville, Inc.	Arlington	WA
Ottawa Ford Lincoln-Mercury, Inc.	Ottawa	IL
Park Ford Sales, Inc.	Iowa Park	TX
Pasadena Lincoln-Mercury, Inc.	Pasadena	CA
Perry Lincoln-Mercury-Merkur, Inc.	Montgomery	AL
Plainfield Lincoln-Mercury, Inc.	Grand Rapids	MI

Dealer	City	State
Robert Woodson Lincoln-Mercury	Wichita Falls	TX
Rochester Lincoln-Mercury, Inc.	Rochester	MN
Royal Lincoln-Mercury Sales, Inc.	Peoria	IL
Royal Ford Lincoln-Mercury, Inc.	West Bend	WI
Shoals Ford, Inc.	Muscle Shoals	AL
Sonoma Ford, Inc., DBA Sonoma	Sonoma	CA
Suburban Ford Lincoln-Mercury, Inc.	El Reno	OK
Sumter Ford Lincoln-Mercury, Inc.	Americus	GA
Sunbelt Ford-Mercury, Inc.	Quincy	FL
Sunrise Ford Lincoln-Mercury, Inc.	Ashtabula	OH
Tower Ford Mercury, Inc.	Fulton	MO
Town & Country Lincoln-Mercury, Inc.	Brunswick	OH
Tropical Ford, Inc.	Orlando	FL
Tuskegee Ford-Mercury, Inc.	Tuskegee	AL
Union City-Ford Lincoln-Mercury, Inc.	Union City	TN
Universal Ford Sales, Inc.	Crosby	TX
University Ford of Peoria, Inc.	Peoria	IL
Verde Valley Ford Lincoln-Mercury, Inc.	Cottonwood	AZ
Victory Ford, Inc.	Morgantown	WV
Wauseon Ford, Inc.	Wauseon	OH
Waynesboro Sales & Service, Inc.	Waynesboro	VA
West Covina Lincoln-Mercury, Inc.	West Covina	CA
West Suburban Ford, Inc.	West Des Moines	IA
Western Ford Mercury, Inc.	Clyde	OH
Westwood Ford Lincoln-Mercury, Inc.	Fort Dodo	IA